Supreme Court, U.S.
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No. 95-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

JAMES T. BENSON,

Petitioner,

v.

COMMUNICATIONS WORKERS OF AMERICA and CONTEL OF VIRGINIA,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

PETITION FOR A WRIT OF CERTIORARI AND APPENDIX

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QUESTIONS PRESENTED FOR REVIEW

I. Does a union acting as an "exclusive representative" under § 9(a) of the National Labor Relations Act, 29 U.S.C. § 159(a), breach its duty of fair representation to one employee by pursuing a grievance-arbitration on behalf of another employee, where

A. the union intends to remove the first employee from a job to which he had been promoted by his employer on the basis of his superior qualifications;

B. the union provides the first employee with no notice of or opportunity to be heard at any stage of the process, does not inform him that it has taken an adversary role against him, and does not even suggest that he should seek to represent himself; and

C. because of the first employee's nonparticipation, the arbitrator is deprived of key evidence favorable to that employee, and erroneously rules in favor of the second employee, resulting in the first employee's loss of his promotion?

II. If the conduct of a union as described in QUESTION No. I, *ante*, is not a breach of its duty of fair representation, is § 9(a) of the National Labor Relations Act, as applied to the first employee through the union's conduct, repugnant to the First and Fifth Amendments of the Constitution of the United States?

III. Does an employer violate a collective-bargaining agreement by removing the first employee from the position to which he had previously been promoted, as the result of an erroneous arbitration-award vitiated by the union's improper conduct, as described *ante*?

PARTIES TO THE PROCEEDING IN THE COURT OF APPEALS

The caption of this petition identifies all the parties to the proceeding in the United States Court of Appeals for the Fourth Circuit, the judgment of which is sought to be reviewed.

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App - appendix to this petition
CBA - collective bargaining agreement
Contel - Contel of Virginia, Inc.
CWA - Communications Workers of America
DFR - duty of fair representation
NLRA - National Labor Relations Act

INTRODUCTION

Pursuant to this Court's Rules 12 through 14, James T. Benson petitions for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit.

DECISIONS BELOW

The Court of Appeals' decision is unpublished, and appears in the Appendix ("App") at 1a. The District Court's decision is reported at 866 F. Supp. 910 (E.D. Va. 1994), *in* App at 10a. The Magistrate Judge's report is reported in 866 F. Supp. at 916, *in* App at 16a.

JURISDICTION

The Court of Appeals entered its opinion on 25 March 1996. This petition is timely under this Court's Rule 13.1. This Court has jurisdiction under 28 U.S.C. § 1254. Pursuant to Rule 29.4(b), this petition is being served on the Solicitor General, because 28 U.S.C. § 2403(a) may apply. The Court of Appeals did not certify to the Attorney General that the constitutionality of an act of Congress was drawn into question in that court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This petition involves § 9(a) of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 159(a), and the First and Fifth Amendments to the Constitution of the United States. The text of these provisions appears in App at 78a.

STATEMENT OF THE CASE

I. Statement of the case. Benson sued respondent Communication Workers of America ("CWA") for breach of its duty of fair representation ("DFR") and respondent Contel of

Virginia, Inc. ("Contel") for breach of a collective-bargaining agreement. Alternatively, Benson contended that, if CWA did not breach its DFR, then NLRA § 9(a) is unconstitutional. The District Court granted summary judgment to CWA, based on the report and recommendation of the Magistrate Judge.[1] App at 15a. The Court of Appeals affirmed. App at 1a.

II. Statement of the facts.[2] Contel has recognized CWA as the NLRA § 9(a) "exclusive representative" for a bargaining-unit of employees including Benson and non-party Barbara Kirker. Contel and CWA entered into a collective-bargaining agreement ("CBA") establishing procedures Contel would follow to select employees for job-assignments, and a grievance-arbitration process for resolving disputes.

Contel posted a "Notice of Job Opening" for a "Service Technician" position. App at 127a-28a. Among others, Benson and Kirker applied for the position. The CBA required Contel to select the "best qualified senior applicant". Contel assigned the position to Benson, because he was better qualified (although he had less seniority) than Kirker.

CWA then initiated a grievance, on the theory that Kirker was qualified and senior to Benson. CWA based its position on an arbitration-award in an unrelated case (the "Ables Award"), which it interpreted to hold that the relative qualifications of Benson and Kirker were irrelevant, and that seniority alone controlled. Contel argued that the Ables Award was inapplicable, and that the company could select the better-qualified person, which in Contel's view was Benson. Norman Harlan was selected to arbitrate the dispute.

Although Benson was aware Kirker had filed a grievance, he learned from Contel representatives about the arbitration only shortly before the hearing. At that point, he provided Contel with information concerning his work-history that supported its decision. However, CWA—Benson's NLRA § 9(a) representative—never gave

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[1] Contel agreed to abide by any order the District Court issued. *See* App at 2a n*, 10a n.1, 105a-07a. Thus, the only party disputing QUESTION No. III, *ante* at i, is CWA.

[2] This statement follows the Magistrate Judge's report. App at 17a-23a. Additional facts are referenced to the Appendix.

him notice of, or an opportunity to participate in, its decision to pursue the grievance, any part of the grievance-process, the selection of Harlan, or the arbitration itself. CWA did not inform Benson it was advancing a position contrary to his interests. And CWA did not tell Benson that he could or should seek his own legal counsel or other representative. Indeed, until he learned of Harlan's adverse decision, Benson was unaware that CWA's prosecution of the arbitration could lead to his loss of the position. He believed that, even were Kirker's grievance upheld, a junior employee would be demoted in favor of Kirker, and he (Benson) would remain a Service Technician.

Norman Gleichman, CWA's attorney during the arbitration, testified in a deposition that CWA did not consider how the arbitration would affect Benson, because the union's position was that the CBA required selection of Kirker on seniority alone. Gleichman did not contact Benson, because "nothing [Benson] could have told me * * * would have been relevant to the issue in arbitration". App. at 113a-14a. In the event, though, "the issue in arbitration" changed from that of pure seniority to the relative qualifications of Benson and Kirker.[3] Nonetheless, CWA never contacted Benson to evaluate his qualifications. Gleichman also testified that, because the nominal parties to the arbitration were CWA and Contel, Benson's attempt to participate would have been "similar to someone walking off the street into a court room where the person is not a party to the dispute and asking to be heard", and that no precedent existed for an employee's independent participation in an arbitration. App at 115a-17a.

As a result of lack of notice from CWA, Benson did not participate in any stage of the grievance-arbitration. Benson did not even attend the hearing, and became aware of it only after it was held. And Benson learned of the possible consequences of CWA's promotion of Kirker's interests only when told Harlan's decision had resulted in his demotion. App at 95a. In a discovery-deposition, however, Benson testified that he "[m]ost definitely" would have appeared and testified at the hearing if he had been asked to do so.

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[3] *See* App at 67a: "[b]oth Management and the Union went into considerable detail in their Briefs discussing qualifications" (emphasis in original).

App at 110a. And in a declaration submitted to the District Court, he described how his testimony could have shown that his previous experience made him more qualified than Kirker with respect to the factors set out in the Notice of Job Opening. App at 96a-104a. CWA presented no evidence refuting Benson's statements.

At the arbitration-hearing, although CWA asserted "strict seniority", it also litigated relative qualifications. Contel argued that Benson's experience with another employer had given him qualifications greatly superior to Kirker's, which rendered her seniority irrelevant. Al Ryder, the individual at Contel who best knew Benson's work-attributes, testified that Benson

> was head and shoulders—well, probably from the waist up—above all the other * * * candidates. Mr. Benson was much more impressive in his conduct during the interview, his presentation of the answers, his background that he had. He * * * answered the questions more completely than the other ones. He just had a much better general presentation ability of himself. * * * He was more convincing that he knew how to handle the problems that could be expected [in the Service Technician position].

App at 120a. Notwithstanding Benson's being "more convincing", Contel failed to call him as a witness.

Harlan ruled that the promotion should have gone to Kirker, because she was as or nearly as qualified as Benson, and had seniority. Harlan noted that "the supervisory/general administrative experience gained by Mr. Benson with other Employers was a major factor in his being rated the highest, *in spite of the fact these are not mentioned on the job posting*". App at 75a-76a (*italics* supplied). Thus, Contel failed to explain the relationship between Benson's experience and the requirements on the Notice; and Contel's failure led Harlan to conclude that Kirker was as or nearly as qualified as Benson. In his declaration, however, Benson described how he could have related his experience directly to the requirements, and shown himself significantly more qualified than Kirker. App at 96a-104a.

Benson then sued CWA for breach of its DFR, and Contel for a derivative breach of the CBA, and in the alternative for a

declaration that, if CWA did not breach its DFR, NLRA § 9(a) is unconstitutional. App at 84a-89a. The District Court had subject-matter jurisdiction under 28 U.S.C. §§ 1331 and 1337(a), and 29 U.S.C. § 185. App at 80a. *See* this Court's Rule 14(g)(ii).

On cross-motions for summary judgment by Benson and CWA, the Magistrate Judge recommended summary judgment for CWA, on three grounds:

- CWA did not breach its DFR, because its prosecution of the grievance on the basis of seniority alone "was not 'so far outside a wide range of reasonableness as to be irrational'"; and CWA's denial to Benson of notice and an opportunity to participate was not arbitrary, inasmuch as there is no "absolute requirement that a union inform its adversely affected members of its grievance activities". App at 26a-34a.
- Benson showed no erroneous outcome in the arbitration, because his "proferred testimony would have merely described his outside experience in greater detail [than Contel's evidence]". App at 34a-37a. And,
- Benson had no constitutional claim, because the DFR "adequately protects any infringement on his constitutional rights"; there is no "state action" in NLRA § 9(a); and NLRA § 9(a) does not violate the Due Process Clause of the Fifth Amendment. App. at 37a-43a.

The District Court affirmed the Magistrate Judge's report and recommendation on the same grounds. App. at 12a-15a.

The Court of Appeals affirmed. It noted that "[t]he arbitrator found that Benson was given the highest rating for the job because of his supervisory/general administrative experience, in spite of the fact that these factors were not mentioned in the Notice". App at 4a. The court then held that—

- "Whether [the Ables Award] was binding or not, [CWA's] reliance on it was certainly not arbitrary * * *. This conclusion is not adversely impacted by the fact that * * * CWA went beyond a pure seniority position and bolstered its case with evidence as to the relative qualifications of Kirker as opposed to Benson." App. at 6a-7a.
- "[T]aken by itself, the failure to give notice does not constitute breach of [the DFR]. * * * Benson was not prejudiced by the lack of notice and an opportunity to participate in the grievance

proceeding. * * * [Harlan] 'was fully aware of Benson's qualifications. Benson's proferred testimony would not have impacted the arbitrator's decision based upon his interpretation of the Agreement.'" App at 7a.

- "[I]n matters involving interpretation of a collective bargaining agreement, the union is not required to offer adversely impacted members notice and an opportunity to participate. * * * As the issue before [Harlan] was a matter of contract interpretation, the failure to accord Benson notice and an opportunity to participate in the grievance proceeding did not violate CWA's [DFR]." App. at 7a.

- "Benson actively assisted Contel in preparation for the arbitration hearing. * * * Contel placed before the arbitrator the relevant facts concerning Benson's prior job experience and qualifications. * * * Benson * * * provided Contel with everything he could think of to aid in preparation of the case and he knew the company was going to defend its decision to select him * * *. Thus, the arbitrator had all relevant information before him, and we find no evidence that the outcome of the arbitration was erroneous." App at 8a.

- "The validity of Benson's constitutional claim depends upon the existence of state action. * * * *Bures v. Houston Symphony Soc.*, 503 F.2d 842, 843 (5th Cir. 1974), * * * held that a union, in handling a grievance, is not required to employ procedures which satisfy the constitutional guarantee of due process because 'a grievance procedure agreement between union and private employer involves no state or federal action....'"

"Additionally, * * * the [DFR] serves as 'a bulwark to prevent arbitrary union conduct against individuals stripped of traditional forms of redress by the provisions of federal labor law.' *Vaca v. Sipes*, 386 U.S. at 182. This protection * * * is sufficient to avoid the 'grave constitutional problems' which would otherwise be raised by the statutory grant of power to a union to act as the exclusive agent of its members. *Id.* Accordingly, in the labor environment, the [DFR] * * * functions as a substitute for traditional due process protection." App at 8a-9a.

This petition followed.

ARGUMENT FOR ALLOWANCE OF THE WRIT

A writ is warranted here under this Court's Rules 10(a) and 10(c), because:

- The Circuit Court's decision runs roughshod over the basic principle of the DFR as to notice and hearing this Court established in *Steele v. Louisville & Nashville Railroad Co.*, 323 U.S. at 192, 204 (1944). Moreover, the decision conflicts with decisions of another Court of Appeals and of a State supreme court on the invalidity of an arbitration-award a union obtains without notice to affected employees.[4]
- The Circuit Court's decision denies there is state action in the status of an exclusive representative under NLRA § 9(a). Although *Steele* decided that state action exists under the analogous provision of the Railway Labor Act, this Court has not addressed this fundamentally important, recurring question under NLRA § 9(a). As a result of erroneously denying the existence of state action, the Circuit Court has countenanced the stripping of associational and property rights from employees with *no* procedural due process whatsoever—a travesty that can inflict significant harm on untold numbers of workers annually.[5]

I. THE CIRCUIT COURT'S ACCEPTANCE OF THE OUTCOME OF THE ARBITRATION RAISES THE BASIC ISSUE OF WHETHER EMPLOYEES CAN BE REQUIRED TO SUFFER THE CONSEQUENCES OF "REPRESENTATION" BY THEIR EMPLOYERS WHEN THEIR UNIONS BREACH THE DUTY OF FAIR REPRESENTATION.

CWA's breach of its DFR forced Benson to accept *ersatz* and ineffective "representation" in the arbitration by Contel. This Court

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[4] Smith v. Hussmann Refrigerator Co., 619 F.2d 1229 (8th Cir. 1980); Clark v. Hein-Werner Corp., 8 Wis. 2d 264, 99 N.W.2d 132 (1959).

[5] Although the Circuit Court did not publish its opinion, the District Court did. And the *Federal Reporter* shows the bare affirmance.

has never held that an employee, deserted by his union, can be denied an opportunity independently to participate in an arbitration that affects his employment, and relegated to catch-as-catch-can "representation" by his employer. Moreover, the NLRA categorically excludes all employer "representation" of employees. This Court needs to address the issue now, as this situation arises whenever a union chooses in a grievance to represent one employee and the employer takes a position supportive of another.

Specifically here, CWA was not entitled to summary judgment, because the outcome of the arbitration was erroneous, due to the union's breach of its DFR, and irrespective of what Contel attempted to do that might have inured to Benson's benefit.

A. The Circuit Court's opinion. The Circuit Court stated that "Benson was given the highest rating for the job because of his supervisory/general administrative experience, *in spite of the fact that these factors were not mentioned in the Notice*". App at 4a (emphasis supplied). This begs the question whether *Benson* could have shown how "these factors" related to the requirements in the Notice.[6]

The court also stated that Benson was not prejudiced by lack of notice and opportunity to participate because Harlan was "'fully aware of Benson's qualifications. Benson's proferred testimony would not have impacted the arbitrator's decision based on his interpretation of the Agreement'". App at 7a. This, too, begs the question whether Benson could have convinced Harlan of the relation of Benson's qualifications to the requirements in the Notice—which Harlan said Contel had *not* shown him.

Finally, the court observed that

> Contel placed before the arbitrator the relevant facts concerning Benson's prior job experience and qualifications. In fact, Benson * * * provided Contel with everything he could think of to aid in preparation of the case and he knew the company was going to defend its decision to select him for the position.

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[6] The evidence must be viewed in the light most favorable to Benson. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). Thus, this Court must conclusively presume from his declaration that he could have shown the relationship. *See* App at 96a-104a.

> * * * Thus, the arbitrator had all relevant information before him * * * .

App at 8a. The conclusion is a *non sequitur*. That Benson provided Contel with information does not support the inference that Contel provided that information fully and convincingly to Harlan. Indeed, Contel clearly did not—because Harlan saw no connection between Benson's previous experience and the requirements on the Notice.

B. The Magistrate Judge's and the District Court's opinions. The opinions of the Magistrate Judge and the District Court echo the hollowness of the Circuit Court's analysis.

1. The Magistrate Judge's opinion. As the Magistrate Judge conceded *arguendo*, "[h]ad [Benson] testified, he could have explained how his '* * * experience * * *' in fact did provide him with qualifications superior to Kirker's *with respect to the requirements on the job posting*"; and "could have presented his superior qualifications in a manner * * * far more convincing than * * * Contel's management presented them". App at 35a-36a (emphasis supplied). Never the less, the Magistrate Judge ruled *against* Benson. His error is clear:

- To rule for Benson, Harlan needed to be shown a connection between Benson's experience and the qualifications on the Notice. For "Harlan's decision shows that he was fully aware of the nature of Benson's superiority [to Kirker]". App at 36a.
- Contel did not show this connection—but Benson could have. *Compare* the Notice *in* App at 127a-28a *with* Benson's Declaration ¶¶ 8-15, *in* App at 96a-104a.
- However, Benson did not testify because of CWA's breach of its DFR. *See* App at 95a-97a.
- *Ergo*, "Benson's proffered testimony" would most definitely "have impacted * * * Harlan's decision". *Pace* App at 37a.

Thus, compelling here is the reasoning in *Smith*:

> The union * * * contend[s] that specific representation of [the employees] was unnecessary since the only evidence of [their] skills and abilities cognizable at the hearing was as they were known by the company foreman * * * who had selected [them]. The union asserts that this obviated any need for [the employees] to testify * * * . The facts belie this argument. *

> * * The arbitrator clearly viewed [the employees'] experience as determinative * * * regarding relative skill and ability. * * * [I]t can be inferred that [the employees] would * * * be able to relate their outside work experience better than the company representative. Thus, the failure to invite [the employees] to the arbitration hearing may have left them inadequately represented regarding a crucial factor in the dispute.[7]

That conclusion is also self-evident here, because Contel *failed*:

- to appreciate that testimony relating Benson's experience to the qualifications listed on the Notice would be crucial;
- to appreciate the significance of Benson's *personal* testimony;
- to call Benson as a witness, or to suggest he appear on his own;
- to present testimony equivalent to what Benson could have given; and
- to explain to Harlan *how* Benson's experience related to the posted requirements.

These failures are particularly significant given that Benson "answered [Contel's] questions more completely than the other [applicants]", "had a much better general presentation", and "was more convincing that he knew how to handle the problems". App at 120a. *See ante* at 4.

2. The District Court's opinion. The District Court's statement that Harlan "was fully aware of * * * Benson's qualifications because Benson actively assisted Contel in preparing its case" is a *non sequitur*. *Pace* App at 14a. Benson may have "assisted Contel" *outside* the hearing; but *at* the hearing Contel failed to call Benson or otherwise to show *how* his experience related to the requirements on the Notice. Benson cannot be bound by *Contel's* failure, for several reasons:

- Contel was not Benson's NLRA § 9(a) representative, and owed no duty of representation to him.[8] Rather, the NLRA conclusively presumes that employers and employees are

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[7] Smith v. Hussmann Refrig. Co., 619 F.2d 1229, 1242 (8th Cir. 1980)(plurality opinion).

[8] Harrison v. UTU, 530 F.2d 558, 561 (4th Cir. 1975).

antagonists, and that interposition of a union under § 9(a) is necessary to protect employees *against* their employers.[9]

- Contel was not required to guarantee that CWA fairly represented Benson, or to provide surrogate representation when CWA defaulted. To the contrary: Contel was entitled to rely on CWA's decisions as to how the union handled the arbitration.[10]
- Contel never told Benson it would represent him. And any such claim would have violated the NLRA.
- Contel had no duty to give Benson notice, to call him as a witness, or to advise him to intervene in the proceeding.[11]
- That Contel took a position favorable to Benson is irrelevant.

> Even though a company may take a position favorable to a particular group of employees, the union may not abandon that particular group * * * . The union is the agent of all employees * * * and owes a fiduciary duty to represent their interests and rights * * * . Here the union not only abandoned [Benson] but took an adversary attitude toward [him] regarding the position[he] had received by reason of the company's opinion of [his] skill and ability. The union took the position that any representation of [Benson] would be made by the company, while the company * * * properly protected only its self-interest which may or may not have corresponded to the interests of [Benson].[12]

Indeed, even an identity in Contel's and Benson's interests "is beside the point on the issue of whether [Benson was] entitled to notice of the hearing [from CWA] * * * . *Employees should never*

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[9] *See* NLRA § 8(a)(1, 2), 29 U.S.C. § 158(a)(1, 2).

[10] *See* Bowen v. United States Postal Service, 459 U.S. 212, 226 (1983); Carrol v. BRT, 417 F.2d 1025, 1028 (1st Cir. 1969).

[11] *See* Thompson v. IAM, 258 F. Supp. 235, 240 (E.D. Va. 1966) (company did not have to "do anything other than present its own case").

[12] Smith v. Hussmann Refrig. Co., 619 F.2d 1229, 1238-39 (8th Cir. 1980)(plurality opinion). Compounding its breach of the DFR, CWA never warned Benson that "any representation of [him] would be made by the company", not the union.

be put in the position of having to solely depend upon the employer championing their rights".[13]

The District Court's statement that no evidence indicates that Benson was "inclined to intervene in the arbitration for the purpose of bolstering the Company's case" is plainly *wrong*. *Contrast* App at 14a *with id.* at 110a. It also misses the point that neither CWA (which had a *fiduciary* duty to Benson) nor Contel warned him of the possible adverse outcome of the arbitration, or advised him to appear. *See* App at 95a-96a, 100a-01a. And CWA never advised Benson that it intended not to represent his interests.[14] "Inclinations" that arose only as a result of Benson's lack of notice through CWA's dereliction cannot be held against him.[15]

The District Court's statement that "Benson determined that the best protection of his interests lay in helping Contel prepare its case" also forgets that neither CWA nor Contel provided Benson with notice of the consequences of his failure to appear. Absent notice, Benson could not make an informed determination as to how to protect his interests. In any event, Benson was not relying on Contel. App at 96a, ¶ 7. And, as a matter of law, Contel owed Benson no DFR; and CWA could not, by unilaterally repudiating its DFR to Benson, require him to rely on Contel.

In sum, the Circuit Court's decision has created a vast lacuna in which employees' rights may be drowned. A union may simply desert one employee in a grievance-situation, pan off on the employer its *statutory duty* to represent that employee, and then defend against the deserted employee's DFR claim by blaming the employer for ineffective "representation" of the employee! This

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[13] Clark v. Hein-Werner Corp., 8 Wis.2d 264, 275, 99 N.W.2d 132, 138 (1959)(emphasis supplied).

[14] *See* Harrison v. UTU, 530 F.2d 558, 561 (4th Cir. 1975); Minnis v. UAW, 531 F.2d 850, 853-54 (8th Cir. 1975); Day v. UAW, 466 F.2d 83, 87-88 (6th Cir. 1972).

[15] Benson did not contact CWA. But the duty to communicate information was an affirmative fiduciary duty on CWA, fulfillment of which was not contingent upon a request by Benson. *See* NLRB v. Missouri Local, Postal Workers, 618 F.2d 1249, 1255 (8th Cir. 1980); Robesky v. Qantas Empire Airways, 573 F.2d 1082, 1090 n.17 (9th Cir. 1978)(Railway Labor Act); H.C. Macauly Foundry Co. v. NLRB, 553 F.2d 1198, 1201 (9th Cir. 1977).

stands the DFR—and the whole theory of "representation" under the NLRA—on their heads.

II. THE CIRCUIT COURT'S DECISION FLIES IN THE FACE OF THIS COURT'S DECISION IN *STEELE* AND CONFLICTS WITH DECISIONS OF ANOTHER UNITED STATES COURT OF APPEALS AND A STATE SUPREME COURT THAT EMPLOYEES WHOM UNIONS DESERT HAVE A RIGHT TO PARTICIPATE IN AN ARBITRATION ON THEIR OWN.

CWA's obligation "to represent *all* members of [the bargaining] unit requires [the union] to make an honest effort to serve the interests of *all*", and "to maximize job opportunities for *all*".[16] For that reason, when CWA took a position "necessarily antagonistic" to Benson, it could not prevent him "from having a fair hearing".[17] Where the "processing of [Kirker's grievance] * * * was intended to and did decide [Benson's] right to the promotion[ ], which [he] had received from [Contel] on the basis of [his] superior skill and ability", CWA had a "'duty to consider not only the interests of [Kirker] but also those of [Benson]'". For as the incumbent in the Service Technician's position, Benson *prima facie* "possessed rights under the [CBA] which [CWA] had a fiduciary duty to protect".[18] Benson undeniably was "materially affected by" the Kirker arbitration, as Harlan's award did "oust[ ] him from his position"—and "surely the employee * * * is as much

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[16] Ford Motor Co. v. Huffman, 345 U.S. 330, 337-38 (1953)(emphasis supplied), *and* Dunlap v. United Transportation Union, 826 F. Supp. 957, 960 (E.D. Va. 1992). *See also* Vaca v. Sipes, 386 U.S. 171, 177 (1967).

[17] Local 618, A.P. & A.I.E. v. Gelco Corp., 758 F.2d 1272, 1276 (8th Cir. 1985); Humphrey v. Moore, 375 U.S. 335, 343 (1964).

[18] Smith v. Hussmann Refrig. Co., 619 F.2d 1229, 1237, 1238 (8th Cir. 1980)(plurality opinion).

interested in [his] job as another employee who is trying to take it away from him".[19]

The real question before the Circuit Court—and now here—is: Can a union fulfill its DFR to an employee by doing *nothing* for him, while depriving him of his promotion *on the basis of an incorrect construction of the CBA that even the union abandons in the course of the arbitration*?

A. A union should not be allowed to excuse a breach of its duty of fair representation by admitting the original position it took against an employee was erroneous.

CWA's dogged pursuit of its "strict-seniority" theory did not fulfill its duty to maximize job opportunities for *all* employees. CWA arbitrarily rejected the possibility that Harlan would accept Contel's theory, refusing to do *anything* to protect Benson's interests, by denying him *all* notice and opportunity to participate. From the outset, CWA *wrongly* assessed the issue—although, if the Ables Award did not control, Benson was arguably entitled to the Service Technician position.[20] Moreover, CWA knew or should have known that, in the latter eventuality, *it was CWA's duty to protect Benson's position*. No concept of "reasonableness" can allow CWA to disregard Benson's interests simply because it had decided dogmatically that the interpretation of the CBA favorable to him was foreclosed by the Ables Award no matter what. Indeed, that CWA did *not* prosecute the arbitration solely on the "strict-seniority" theory *but itself litigated the issue of qualifications* belies the notion that it believed exclusive reliance on the Ables Award was reasonable.

Even if the initial decision to pursue the "strict-seniority" theory was reasonable *in abstracto*, CWA's refusal to provide

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[19] BRAC v. St. Louis Southwestern Ry., 676 F.2d 132, 135 (5th Cir. 1982)(Railway Labor Act); Hunter v. Atchison, T. & S.F. Ry., 188 F.2d 294, 300-01 (7th Cir. 1951) (Railway Labor Act).

[20] In the event, Harlan concluded the Ables Award was not *res judicata* and was inapplicable to Kirker's grievance, and that relative qualifications controlled. App at 56a-61a, 71a-73a.

Benson with notice and opportunity to be heard was arbitrary. No *legitimate* union interest was served by refusing simply to tell Benson that CWA would not represent him, that its actions could cost him his promotion, and that he would have to represent himself. Had Benson sought to intervene in the arbitration without any entitlement, Harlan would have excluded him. Had Benson been entitled to participate, CWA had no right to exclude him.[21] And CWA had no right to keep Benson in the dark about its own actions and their predictably adverse effects on him.[22]

B. A union should not be allowed to refuse to represent an employee, or to prevent the employee from representing himself, when he has an arguably valid defense against another employee the union is representing in an arbitration.

The Circuit Court claimed that, "[a]s the issue before the arbitrator was a matter of contract interpretation, the failure to accord Benson notice and an opportunity to participate * * * did not violate CWA's [DFR]". App at 7a. Contract interpretation, however, was *not* the only issue. Relative qualifications were also

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[21] As CWA's attorney admitted, the issue of participation by an individual employee in an arbitration is "just something that has not come up" in previous arbitrations; and he was "not sure how that would have been handled". App at 114a. Case-law, however, supports Benson's right to intervene. Clark v. Hein-Werner Corp., 8 Wis. 2d 264, 273, 99 N.W.2d 132, 137 (1959)(arbitrator has duty to allow intervention); Smith v. Hussmann Refrig. Co., 619 F.2d 1229, 1241 (8th Cir. 1980)(plurality opinion)(union violates DFR by not inviting affected employees to arbitration-hearing); Donnelly v. United Fruit Co., 40 N.J. 61, 80-81, 10 A.2d 825, 835 (1963) (*dicta*). And even if Benson could not have participated in the arbitration himself, with proper notice he might have demanded that CWA promote his interests on the issue of qualifications, thereby causing CWA to re-think its own position, or have asked Contel to call him as a witness.

[22] *Cf.* Local 860, Teamsters v. NLRB, 652 F.2d 1022, 1025 (D.C. Cir. 1981). Disclosure would have amounted at most to a trivial burden CWA could have satisfied through a simple letter to Benson from some union official or the attorney who handled the arbitration.

litigated—indeed, Harlan's decision turned on them.[23] But when qualifications emerged as controlling—and with Benson having a strong argument—nevertheless CWA did *nothing* even to ascertain the merits of his position, let alone to represent him. Yet CWA knew or should have known that: the Ables Award was not *res judicata*; Contel disputed applicability of the Ables Award on grounds Harlan later adopted; Benson had been promoted on the basis of Contel's theory; if Contel proved correct, CWA's DFR imposed on it an affirmative, fiduciary duty to promote Benson's interests; and, therefore, to fulfill its DFR, CWA needed to investigate the merits of Benson's position, at least when it determined that qualifications were relevant after all.[24]

As Benson's NLRA § 9(a) representative, CWA could not "not represent" him, even to represent Kirker. Of course, had Kirker's claim on qualifications been plainly meritorious and Benson's frivolous, CWA could have prosecuted only Kirker's grievance. Even if CWA did not know *ab initio* which employee's position on qualifications was meritorious, it could have prosecuted Kirker's grievance to the exclusion of Benson's on the "strict-seniority" theory alone. However, because of the inescapable conflict of interest CWA faced on the issue of qualifications, it also had to take *some prophylactic action* responsive to the contingency that, until the grievance had been adjudicated in Kirker's favor on seniority alone, Benson's position on qualifications might prove correct.[25]

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[23] Had seniority alone controlled, Kirker would have prevailed with no inquiry into qualifications. And if CWA had litigated only the "strict-seniority" theory, not disputing Benson's superior qualifications, Benson would have prevailed. *Ergo*, the Circuit Court's version of the issue is simply wrong.

[24] The Circuit Court opined that CWA's reliance on the Ables Award was not arbitrary, and that "[t]his conclusion is not adversely impacted by the fact that, in the grievance procedure, CWA went beyond a pure seniority position and bolstered its case with evidence as to * * * qualifications". App at 7a. In fact, however, CWA did not merely "bolster" its "strict-seniority" case, but argued a *different* factual case based on qualifications.

[25] When CWA abandoned the "strict-seniority" theory, Benson had a valid grievance against CWA's exclusive promotion of Kirker's interests. And "a union may not arbitrarily ignore a meritorious grievance". Vaca v. Sipes, 386 U.S. 171, 191 (1979).

At a minimum, CWA should have afforded Benson *some* notice and opportunity to be heard. CWA's failure to do anything to protect Benson evidenced reckless disregard for his rights.[26]

The Circuit Court, however, has ruled that, even though a conflict of interest existed between Kirker and Benson, even though their relative rights were undetermined, *and even though CWA eventually did argue a theory arguably supportive of Benson's rights*, nevertheless NLRA § 9(a) licensed CWA to represent *only* Kirker and to *abandon* Benson—in effect, *to choose to have no DFR towards him*. The court did not explain what sort of a *"duty"* of fair representation a union may unilaterally disregard.

C. The Circuit Court's decision conflicts with this Court's decision in *Steele* and with decisions of another United States Court of Appeals and a State supreme court.

The Circuit Court's theory that CWA's failure to provide even notice did not breach its DFR conflicts with the leading decision of this Court. *Pace* App at 7a. *Steele* v. *Louisville & Nashville Railroad* makes clear that, "[w]henever necessary * * * the union is required to consider requests of [employees] and expressions of their views with respect to collective bargaining with the employer *and to give them notice of and an opportunity for hearing upon its proposed action*".[27] The elements that compel application of the "whenever necessary" factor in Benson's case are:

- Once CWA had decided to prosecute Kirker's grievance to Benson's detriment; and
- recognizing that that decision embodied an inescapable *conflict of interest* with respect to its *fiduciary* duty[28] to represent *both* Benson and Kirker fairly;
- *at that point*, CWA had a duty to provide Benson with notice and an opportunity to participate in the arbitration.

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[26] *See* Dutrisac v. Caterpillar Tractor Co., 749 F.2d 1270, 1272-73 (9th Cir. 1983).

[27] 323 U.S. 192, 204 (1944)(emphasis supplied).

[28] *See* ALPA v. O'Neill, 111 S. Ct. 1127, 1134 (1991).

NLRA § 9(a) required CWA to represent the interests of *both* Benson *and* Kirker.[29] When CWA's purely formal status as Benson's § 9(a) representative transmogrified into its active function as his antagonist, however, CWA was required to apprise Benson that its relationship to him had become hostile, and that if he wanted his interests protected at the arbitration he would have to participate on his own. CWA, however, did none of this.

The Circuit Court's decision also conflicts with *Smith* v. *Hussmann Refrigerator Co.*, 619 F.2d 1229 (8th Cir. 1980), and *Clark* v. *Hein-Werner Corp.*, 8 Wis. 2d 264, 99 N.W.2d 132 (1959).[30]

1. In *Smith*, three judges ruled that the union violated its DFR by failing to give the employees notice of the first arbitration hearing.[31] Two judges ruled that "the [employees] were adequately represented by management in that first hearing, *although a jury could find that the union was derelict in not giving the [employees] notice of time, place and nature of the hearing*".[32] Thus, a majority of five judges viewed the union's failure to provide notice of the first arbitration hearing as evidence of a violation of its DFR. The same five judges also agreed that the union's failure to provide notice of the second arbitration hearing violated its DFR.[33] In addition, the entire court summarized "the determinations made by the majority" as follows:

> The subsequent collaboration between the employer * * * and the Union, for the purpose of obtaining a modification of the previous arbitration award, *without notice or opportunity to*

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[29] "[T]he exercise of a granted power to act in behalf of others involves the assumption toward them of a duty to exercise the power in their interest and behalf". Steele, 323 U.S. at 202 (emphasis supplied), *quoted in* O'Neill, 111 S. Ct. at 1133.

[30] The Circuit and District Courts cited neither *Smith* nor *Clark*. The Magistrate Judge belittled the cases' applicability. App at 28a-31a.

[31] 619 F.2d at 1241-42.

[32] *Id.* at 1246 (emphasis supplied).

[33] *Id.* at 1242-43, 1246-47.

> *[the complaining] employees * * * to protect their rights, operated to deprive [the employees] of valuable employment rights and constituted sufficient evidence * * * for a jury to decide that the Union had breached its [DFR].*[34]

This perfectly supports Benson's claim—for he received notice from neither CWA nor Contel.[35]

2. In essence, *Clark* holds that an arbitration-award must be set aside where: the union has taken a position that pits the interests of one group of employees against another; and the latter group has no notice of and does not participate in the arbitration.[36] *Clark* was so interpreted in *Thompson* v. *IAM*, which held that "the failure to give notice coupled with inadequate preparation and presentation * * * demonstrates a breach of the union's [DFR]".[37] The only difference between Benson's case and Thompson's is that Thompson received "*inadequate* preparation and presentation", whereas Benson received ***none***.

3. While not addressing *Smith* or *Clark*, the Circuit Court misplaced reliance on *Evangelista* v. *Inlandboatmen's Union*[38]. There, "the issue [was] the proper construction of a collective bargaining agreement" *only*; and the employee "admitted in her

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[34] *Id.* at 1253 (emphasis supplied).

[35] *See also* Barnard v. Commercial Carriers, Inc., 863 F.2d 694, 699 (opinion of the court), 699 (concurring opinion) (10th Cir. 1988).

[36] *Clark* does state the arguably overboard rule that "where the interests of two groups of employees are diametrically opposed and the union espouses the cause of one in the arbitration, it follows as a matter of law that there has been no fair representation of the other group". 8 Wis. 2d at 272, 99 N.W.2d at 137. Nonetheless, *Clark* would have countenanced an arbitration-award where the adversely affected employees had notice and opportunity to participate. Thus, *Clark* implicitly recognized that the absence of notice and hearing, *where the union is not in fact representing the affected employees*, is operationally significant. *See* Hanson v. Madison Serv. Corp., 150 Wis. 2d 828, 838-39, 443 N.W.2d 315, 319 (1989); Fray v. Amalgamated Meat Cutters, 9 Wis. 2d 631, 638-39, 101 N.W.2d 782, 786 (1960)

[37] 258 F. Supp. 235, 239 (E.D. Va. 1966). *See also* Acuff v. United Papermakers and Paperworkers, 404 F.2d 169, 171 n.3 (5th Cir. 1968).

[38] 777 F.2d 1390 (9th Cir. 1985), *cited in* App at 7a.

deposition that all of the information she wanted the [union] to have was contained in her * * * grievance and [a] letter".[39] Here, the issue was not simply construction of the CBA, but also relative qualifications. And Benson could have provided significantly more information about *the relation of those qualifications to the job posting* than did Contel, which was *not* his representative and owed him no duty to promote his interests. App at 96a-104a.

III. BECAUSE SECTION 9(a) OF THE NATIONAL LABOR RELATIONS ACT EMBODIES GOVERNMENTAL ACTION, THE CIRCUIT COURT'S MISCONSTRUCTION OF THE DUTY OF FAIR REPRESENTATION RAISES SERIOUS CONSTITUTIONAL ISSUES.

Benson's argument is that:

- Because the powers of an NLRA § 9(a) representative are the products of governmental action, constitutional restrictions apply to their exercise.
- As an NLRA § 9(a) representative, CWA cannot deprive Benson of property without due process of law.
- The basic elements of procedural due process are *some* notice and opportunity to be heard.
- These basic elements are *absolute*, in that an individual is entitled to them whatever the ultimate merits of his claim.
- In prosecuting the arbitration, CWA provided Benson with *no* notice or opportunity to be heard, while nevertheless maintaining with him a forced formal association as his "representative", when the union was actually his antagonist.
- CWA had no constitutionally adequate reason for refusing to provide Benson with *some* notice and opportunity to be heard, while simultaneously maintaining such a forced association.
- The arbitration resulted in Benson's deprivation of valuable property-interests in his employment.

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[39] 777 F.2d at 1397, 1396.

●*Ergo*, if CWA's action was no breach of the DFR, then, as applied to Benson, CWA's actions and *pro tanto* NLRA § 9(a) are unconstitutional under the First and Fifth Amendments.

A. The purported absence of state action. The Circuit Court refused to address the constitutional merits on the specious ground that NLRA § 9(a) involves no state action. App at 8a-9a. The court's reliance on *Bures* is unavailing—for although *Bures* did say that "a grievance-procedure * * * involves no state or federal action",[40] it cited no decision of this Court supporting that notion. Moreover, on the question of due process, *Bures* is mere *dicta*. For Bures *had* received notice and an opportunity for a hearing, in that he was "notified * * * in writing of the proposed termination of his employment"; himself "appealed to the Players Committee, which requested that he audition before it"; but then "refused to appear". Here, CWA *never* notified Benson of the potentially adverse effect of the arbitration; he was *never* requested by CWA (or Contel) to appear before the arbitrator, or even told he could appear; he *never* refused to appear; and he would have appeared and testified, if anyone had so advised. App at 95a-97a, 110a.

Steele held the DFR necessary to avoid *constitutional* issues exclusive representation raises. If an exclusive representative had no "legal obligation or duty to protect the rights of [the employees it represented] from * * * unfair treatment, however gross",

> constitutional questions arise. For the representative is clothed with power not unlike that of a legislature which is subject to constitutional limitations on its power to deny, restrict, destroy or discriminate against the rights of those for whom it legislates and which is also under an affirmative constitutional duty to protect those rights.
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> * * * * *
>
> Congress has seen fit to clothe the bargaining representative with powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it

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[40] Bures v. Houston Symphony Soc., 503 F.2d 842, 843 (5th Cir. 1974).

> represents, * * * but it has also imposed on the representative a corresponding duty.[41]

If CWA's being "clothed [by Congress] with power not unlike that of a legislature" and "comparable to those possessed by a legislative body" is not a description of state action, nothing is.

The delegation in NLRA § 9(a) is pellucidly clear. Benson's demotion from his Service Technician's position was a significant loss of *property* and *liberty* in the constitutional sense.[42] This deprivation occurred

- because Benson was subordinated to CWA under NLRA § 9(a);
- because NLRA § 9(a) "extinguishes [Benson's] power to order his own relations with his employer and creates a power vested in the chosen representative [*i.e.*, CWA]", and "strip[s Benson] of traditional forms of redress";[43]
- because CWA enforced its head-in-the-sand view in favor of Kirker and against Benson;
- without CWA's having provided Benson notice and an opportunity to participate; and

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[41] 323 U.S. at 198, 202 (emphasis supplied). *See also id.* at 208-09 (Murphy, J., concurring). *Steele* arose under § 2, Fourth of the Railway Labor Act, 45 U.S.C. § 152, Fourth. However, the Court referred to "the like provision of the [NLRA]" (§ 9(a)), and cited NLRA judicial precedents and legislative history as authority. 323 U.S. at 200, 202 n.3. Equation of the acts followed from decisions that had held exclusive representation identical under both statutes. NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 44-45 (1937), *citing* Virginian Ry. Co. v. System Fed'n No. 40, 300 U.S. 515, 548-49 (1937). Shortly thereafter, the Court extended the DFR to the NLRA, and ever since has explained that *Steele* was the source of the duty under both statutes. *See* Wallace Corp. v. NLRB, 323 U.S. 248, 255-56 (1944), *and* Ford Motor Co. v. Huffman, 345 U.S. 330, 336-38 (1953), *origin explained in* Vaca, 386 U.S. at 177. *See also* American Communications Ass'n v. Douds, 339 U.S. 382, 401-02 (1950); Vaca, 386 U.S. at 181-83; NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175, 180-81 (1967).

[42] *See, e.g.*, Hitchman Coal & Coke Co. v. Mitchell, 245 U.S. 229, 250-51 (1917)(freedom of employee to contract with employer for employment "is a part of the constitutional rights of personal liberty and private property").

[43] NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175, 180 (1967); Vaca v. Sipes, 386 U.S. 171, 182 (1967).

•notwithstanding the constitutional duty of the national government under the Fifth Amendment not to deprive Benson of property or liberty without due process of law.

As applied here by the Circuit Court, through NLRA § 9(a) Congress has delegated to CWA the power to expropriate Benson (and all other workers subject to exclusive representation) without notice, hearing, or any other requirement of procedural due process—even though Congress itself has a duty not to expropriate anyone without due process. No one would doubt state action existed if Congress empowered CWA to seize from employees of Contel whatever property CWA wanted without notice and hearing, and immunized CWA against criminal or civil penalties for such seizures, and CWA then seized Benson's automobile. No constitutional difference inheres in the circumstance that CWA has expropriated Benson's Service Technician position without notice and hearing (so far with complete immunity from judicial sanctions), rather than his sedan.

B. The duty of fair representation as a purported "substitute" for constitutional procedural due process. The Circuit Court claimed that the DFR "functions as a substitute for traditional due process protection". App at 9a. If so, as to Benson it is a "substitute" of *nothing* for rights this Court holds *absolute*.[44] For Benson enjoyed *no* process in this case: *no* inquiry or other contact by CWA as to his qualifications—*no* notice of the intended adverse consequences of CWA's action—*no* notice that CWA did not intend to represent him—*no* suggestion that he should represent himself—*nothing*. In effect, then, the Circuit Court has ruled that *the completely internal decision by CWA not to represent Benson—on the basis of its erroneous interpretation of the Ables Award—is the only "process" to which he is entitled under the DFR, and that the union's self-interested and ultimately incorrect decision strips him of any constitutional claim*!

No decision of this Court supports such a ruling. *Steele* did hold that infringements on employees' constitutional rights could be obviated by the DFR—*but only because the DFR requires the union*

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[44] Carey v. Piphus, 435 U.S. 247, 266 (1978). *See* McClelland v. Massinga, 786 F.2d 1205, 1210 (4th Cir. 1986).

to behave so as not to infringe those rights.[45] Thus, the DFR would protect Benson *if* the Circuit Court had held that CWA's refusal to provide notice and hearing violated that duty. However, CWA's denial of notice and an opportunity to be heard has been held *not* to violate the DFR. Notice and hearing are elementary aspects of the *constitutional* right of procedural due process. *Steele* held that notice and hearing are also elementary aspects of the DFR.[46] Therefore, if the DFR as applied by the Circuit Court licenses CWA to withhold notice and hearing, then (as *Steele* held), "constitutional questions arise".[47] The Circuit Court did not even attempt to answer these questions, however.

This Court has never addressed whether a union's failure to provide *any* procedural due process to an aggrieved employee offends "the plainest principle of justice" *under the Constitution,*[48] even if that failure is somehow not "arbitrary" *under the DFR. Arguendo*, CWA's actions might have reasonably served some valid *union* objective.[49] However, as an NLRA § 9(a) representative with *constitutional* responsibilities, CWA had to meet a standard higher than its own institutional interests. For example, although an administrative agency might have non-arbitrary reasons for depriving persons of property, it would nonetheless be required to provide *some* procedural due process incident to the taking.[50] Thus, CWA's actions violated the Constitution because the union deprived Benson of property (his job) *without a reason and procedures that would sustain such deprivation by a governmental agency.*

Steele held that a union could not both purport to act as an exclusive representative *and* deny represented employees "notice of

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[45] *See* 323 U.S. at 198-99, 202, 208-09.

[46] *Id.* at 204.

[47] *Id.* at 198.

[48] *See* Consolidated Edison Co. v. NLRB, 305 U.S. 197, 233 (1938).

[49] Benson does not concede that CWA's failure to provide him with *any* notice did in fact serve a valid union goal.

[50] *See, e.g.*, Consolidated Edison Co. v. NLRB, 305 U.S. 197, 233 (1938).

and opportunity for hearing upon its proposed action".[51] Here, the Circuit Court has licensed to CWA the very power *Steele* denied, both to purport to "represent" Benson by depriving him of his job and to deny him any notice and opportunity to be heard by anyone at any time, while simultaneously requiring Benson to accept association with CWA as his "representative".

C. The constitutional merits. If the DFR does not apply to CWA's conduct here, then NLRA § 9(a) is *pro tanto* repugnant to the First Amendment and the Due Process Clause of the Fifth Amendment, because:

- Procedural-due-process rights are *absolute*.[52]
- No rational basis, let alone a compelling governmental interest, exists for allowing CWA to deny Benson procedural due process while simultaneously forcing him to associate with it as his "representative".[53]

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[51] 323 U.S. at 204. The complainants in *Steele* sought an injunction against the union from acting as their exclusive representative "so long as the discrimination continues, *and so long as it refuses to give them notice and hearing which respect to proposals affecting their interests*". The lower courts dismissed the claim. This Court reversed. *Id.* at 197, 208.

[52] Carey v. Piphus, 435 U.S. 247, 266 (1978).

[53] Although the NLRA was enacted under the Commerce Clause, courts still "must ensure * * * that the means selected by Congress are 'reasonably adapted to the ends permitted by the Constitution' ". Preseault v. ICC, 494 U.S. 1, 17 (1990).

•Denying Benson notice and hearing serves no policy of the NLRA,[54] or any other imaginable policy-consideration,[55] and is not the option least-restrictive of Benson's rights.

•CWA's administrative convenience cannot rationalize denial of due-process protections, either.[56]

1. Fifth-Amendment issues. *Consolidated Edison* v. *NLRB*, 305 U.S. 197 (1938), and *Silver* v. *New York Stock Exchange*, 373 U.S. 341 (1963), provide compelling analogies on the procedural-due-process issue. *Consolidated Edison* held that:

•the traditional rule that a party being dispossessed of contractual rights is entitled to notice and hearing "is not of a technical character *but rests upon the plainest principle of justice*"; and

•if the NLRA were interpreted to allow the NLRB "to invalidate the contracts of independent labor unions not before it" the question would arise "as to the validity of the [NLRA]".[57]

Now, if this Court had been compelled to construe the NLRA so as to allow the NLRB to deny notice and hearing, is it probable the Court would also have found constitutional a construction that denied "the plainest principle of justice"?! Of course, *Consolidated*

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[54] *Cf.* Silver v. New York Stock Exchange, 373 U.S. 341, 361 (1963).

[55] *E.g.*, provision of notice and hearing to Benson would not interfere with CWA's duties as exclusive representative, or disrupt the arbitration process. *See* Clark v. Hein-Werner Corp., 8 Wis.2d 264, 275, 99 N.W.2d 132, 138 (1959). And it would not deny Kirker effective representation by CWA, as she is not entitled to prevail by shutting out Benson's evidence. Conversely, denial of notice and hearing to employees in cases of this kind encourages erroneous arbitral decisions. *See* Silver, 373 U.S. at 366. It promotes loss of confidence by employees in their representatives, thereby generating labor instability and unrest. And it compels employees to seek assistance from and align themselves with employers, and against labor organizations, contrary to the basic premisses of the NLRA.

[56] *See* Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 647 (1974). And provision to Benson of notice and opportunity to be heard would impose no burden on CWA in any event. *See* BRAC v. St. Louis Southwestern Ry., 676 F.2d 132, 136 (5th Cir. 1982)(not burdensome to require governmental agency to provide notice to employees whose jobs would be adversely affected by its decision).

[57] 305 U.S. at 233 (emphasis supplied).

Edison construed the NLRA to avoid the constitutional question. Here, conversely, the Circuit Court has implicitly construed NLRA § 9(a) so as to deny "the plainest principle of justice", by licensing CWA to deprive Benson of valuable contractual rights without notice or hearing.

The analogy of *Silver* to Benson's situation is perfect:

- NLRA § 9(a) delegates authority from Congress to employees organized in unions (here, CWA) to "self-regulate" employment-relations, including the contractual property rights of other employees (here, Benson).
- *Steele* read the DFR into the labor laws in order to insure fair dealing by unions—without which the delegation by Congress of *quasi*-legislative power would be unconstitutional.
- CWA has acted in a fundamentally unfair manner by denying Benson any notice or hearing.
- Therefore, the DFR ought not to be construed so as to allow such conduct, because "Congress in effecting a scheme of self-regulation designed to ensure fair dealing cannot be thought to have sanctioned and protected self-regulatory activity when carried out in a fundamentally unfair manner"[28]; and if it must be so construed, then NLRA § 9(a) is unconstitutional.

Here, *the collective bargaining scheme Congress established has broken down*. Benson has been denied the shield of any representation; and the representation CWA owes him CWA has used as a sword to preclude him from speaking on his own behalf. Congress could never have meant to place an employee in this impossible position. And if this is what Congress intended, then NLRA § 9(a) is unconstitutional, as repugnant to any rational conception of "fundamental fairness".

2. First-Amendment issues. Benson also presents strong arguments under the First Amendment:

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[28] Silver, 373 U.S. at 364.

- CWA's status as Benson's exclusive representative impinges on his freedom of (non)association, protected by the First Amendment to the Constitution.[59]
- Congress itself recognized that associational rights are involved in the NRLA.[60]
- The primary associational relationship created by NLRA § 9(a) is *exclusive* representation, under which Benson may not deal individually with Contel.[61] *Exclusive* representation "extinguishes the individual's power to order his own relations with his employer and creates a power vested in the chosen representative", and "strip[s individual employees] of traditional forms of redress",[62] *requiring* Benson to associate with CWA.
- An infringement on First-Amendment rights is justifiable only if it serves a compelling governmental interest, by the means least-restrictive of those rights, demonstrated with evidence in the record by the party relying on the statute (here, CWA).[63] Thus, even if NLRA § 9(a) serves compelling governmental interests *in abstracto*, a restriction on Benson's First-Amendment freedoms is permissible only if it is provably "no greater than is essential to the furtherance

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[59] Freedom of association includes both the freedom to and the freedom not to associate. *See, e.g.*, Abood v. Detroit Bd. of Educ., 431 U.S. 209, 234-25 (1977). It thus includes both the freedom to select a spokesman and the freedom not to do so. *See* Brotherhood of R.R. Trainmen v. Virginia *ex rel.* Virginia State Bar, 377 U.S. 1, 5-6 (1964). Moreover, freedom of speech is involved here, because the purpose of the association among employees is "representation" (*i.e.*, speech).

[60] *Compare* NLRA § 1, 29 U.S.C. § 151 (purpose of NLRA is to "protect[ ] the exercise by workers of full freedom of association") *with* § 7, 29 U.S.C. § 157 (employees have the "right to refrain" from "concerted activities").

[61] *See, e.g.*, J.I. Case Co. v. NLRB, 321 U.S. 332, 337 (1944); Medo Photo Supply Corp. v. NLRB, 321 U.S. 678, 683-84, 687 (1944).

[62] NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175, 180 (1967); Vaca v. Sipes, 386 U.S. 171, 182 (1967).

[63] *See, e.g.*, Rankin v. McPherson, 483 U.S. 378, 388-89 (1987); Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 777 (1986); Thomas v. Review Bd., 450 U.S. 707, 719 (1981); Elrod v. Burns, 427 U.S. 347, 368 (1976)(plurality opinion); DeGregory v. Attorney General, 383 U.S. 825, 829-30 (1966); NAACP v. Button, 371 U.S. 415, 444 (1963).

of [the government's legitimate] interest" *under the facts of this case.*[64]

- Assuming *arguendo* a compelling governmental interest in authorizing CWA to prosecute an arbitration on behalf of Kirker that would impact adversely on Benson, the alternative least restrictive of Benson's rights was for CWA to provide him with notice and an opportunity to participate on his own, to protect the interests CWA had forsaken.

- CWA provided Benson no notice or opportunity to be heard, while at the same time it purported to act as his *exclusive* "representative" by removing him from his job. This infringed Benson's freedom of *non*association—his right to represent himself where his interests unavoidably and unalterably conflicted with CWA's.

- Under these circumstances, CWA has the burden of proving that its use of *overly* restrictive means, to Benson's detriment, was harmless.[65] CWA has not shown and cannot show this.

Therefore, as applied here, NLRA § 9(a) violates the First Amendment, because it is not the least-restrictive means to achieve any compelling governmental interest.

CONCLUSION

This Court should grant the petition, reverse the Circuit Court, and order that summary judgment be awarded to Benson.[66] Arbitrator Harlan "was fully aware of the nature of Benson's superiority" in qualifications. App at 36a. Harlan ruled against Benson only because Contel did not present evidence showing the connection between the qualifications listed on the Notice and

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[64] United States v. O'Brien, 391 U.S. 367, 377 (1968).

[65] *See* Hunter v. Underwood, 471 U.S. 222, 227-28 (1985); Mt. Healthy City Bd. of Educ. v. Doyle, 429 U.S. 274, 286-87 (1977); Introcaso v. Cunningham, 857 F.2d 965, 967 (4th Cir. 1988); Daniels v. Quinn, 801 F.2d 687, 689-90 (4th Cir. 1986).

[66] An appellate court has the authority to do so. *E.g.*, O'Reilly v. County Board of Appeals for Montgomery County, Maryland, 942 F.2d 281 (4th Cir. 1991).

Benson's experience. Benson did not testify only because CWA refused to provide him with notice and an opportunity to be heard, in violation of its DFR or of the Constitution. If he had testified, Benson could have explained the connection. App at 96a-104a.

In the alternative, any remaining question on that score would be for Harlan to decide under the deference-to-arbitration rule.[67] However, because of CWA's breach of its DFR or violation of the Constitution, Harlan's initial decision is a nullity; and Benson is entitled to reinstatement and damages, pending further valid proceedings before the arbitrator.[68] Therefore, this Court should reverse and remand with an order that Harlan's decision be vacated[69] and the case be resubmitted to arbitration. If this Court chooses not to follow the deference-to-arbitration rule, it should reverse and remand for a trial on the narrow issue of the relation of Benson's previous experience to the qualifications listed on the Notice of Job Opening.

Respectfully submitted,

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James T. Benson

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[67] *See, e.g.*, 29 U.S.C. § 173(d); Steelworkers v. American Mfg. Co., 363 U.S. 564, 566 (1960).

[68] *See* De Arroyo v. Sindicata de Trabajadores, 425 F.2d 281, 290-92 (1st Cir. 1970); Brady v. TWA, Inc., 401 F.2d 87, 103 (3d Cir. 1968).

[69] *See* Thompson v. IAM, 258 F. Supp. 235, 239-40 (E.D. Va. 1966); Clark v. Hein-Werner Corp., 8 Wis.2d 264, 99 N.W.2d 132 (1959).

APPENDICES

APPENDIX A

OPINION OF THE

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

March 25, 1996

UNPUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

JAMES T. BENSON, *Plaintiff-Appellant,* v. COMMUNICATIONS WORKERS OF AMERICA; CONTEL OF VIRGINIA, INCORPORATED, d/b/a GTE Virginia, *Defendants-Appellees.*	No. 94-2385

Appeal from the United States District Court
for the Eastern District of Virginia, at Norfolk.
John A. MacKenzie, Senior District Judge.
(CA-93-552)

Argued: June 7, 1995

Decided: March 25, 1996

Before RUSSELL and MOTZ, Circuit Judges, and FABER,
United States District Judge for the Southern District
of West Virginia, sitting by designation.

Affirmed by unpublished opinion. Judge Faber wrote the opinion, in which Judge Russell and Judge Motz joined.

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* * * *

OPINION

FABER, District Judge:

I. *STATEMENT OF THE CASE*

This is an appeal by plaintiff, James T. Benson ("Benson"), from the district court's grant of summary judgment to defendants, Communications Workers of America ("CWA") and Contel of Virginia, Inc. ("Contel"). The district court referred the matter to a magistrate judge and granted summary judgment after it considered Benson's objections to the magistrate judge's Report and Recommendations. Benson, an employee of Contel, brought this action against his union, CWA, for breach of its duty of fair representation, and derivatively against Contel* for breach of its collective bargaining agreement with CWA. In the alternative, Benson contended that, if CWA did not breach its duty of fair representation, § 9(a) of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 159(a), is unconstitutional under the First and Fifth Amendments.

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*By stipulated consent order entered below, Contel agreed to be bound by the terms of any order or injunction issued by the district court and was relieved of its obligation to appear further in the action. (JA at 37.) Similarly, the Clerk of this court was informed that Contel would not file an appellate brief and duly notified Contel it would not be heard at oral argument. (JA at 86.)

II. *STATEMENT OF RELEVANT FACTS*

The material facts are not in dispute. At all relevant times, Contel has recognized CWA as the NLRA § 9(a) "exclusive representative" for a bargaining unit of employees which included Benson and Barbara Kirker ("Kirker"). Kirker is not a party to this action. Contel and CWA were parties to a collective bargaining agreement (the "agreement"), which set forth procedures Contel was required to follow in selecting employees for job assignments and established a grievance procedure for resolving disputes.

In January of 1990, Contel posted a "Notice of Job Opening" for a service technician job. After reviewing the applications submitted, Contel narrowed the field of candidates to four people. Among the four were Benson and Kirker. At the time the vacancy was posted, Kirker exceeded Benson in seniority, having worked for Contel more than six years. Benson had been a Contel employee less than two years. Contel found, and the record demonstrates, that both Benson and Kirker were skilled employees fully qualified for the job. However, Benson was selected because he was found to be better qualified for the position than Kirker. This decision was based upon Benson's extensive previous experience as a supervisor with another employer and in construction. Contel determined that Benson was more impressive during the interviews and had a better background for the job.

CWA filed a grievance, challenging Contel's choice of Benson on the ground that the agreement required selection of the "best qualified senior applicant." Since Kirker had seniority and was qualified, CWA contended, the agreement required that she be given the position. The union's grievance was submitted to binding arbitration pursuant to the agreement. CWA's position was based, in part, upon a 1990 decision by arbitrator Robert Ables which interpreted the precise language of the agreement in dispute. Arbitrator Ables concluded that "[T]he union employee needs only to show he or she is qualified for the position to be entitled to apply seniority as priority for the job." (JA at 140.)

Accordingly, at the grievance hearing, CWA contended that Kirker must be given the job even if Benson were deemed to have comparatively superior qualifications. Additionally, the union offered evidence to show that Kirker was as qualified as Benson, or nearly so. Contel, on the other hand, argued that the agreement required them to use a hybrid "qualifications/seniority" standard and weigh both seniority and relative qualifications in making the selection. Contel presented evidence to show that Benson was more qualified than Kirker for the job.

CWA neither notified Benson of the grievance hearing, nor asked for his participation or input. Benson was made aware of Contel's position, however, and helped Contel prepare its case by providing them with relevant information, such as his prior work experience. Benson was not called as a witness by either party at the arbitration hearing.

The arbitrator concluded that Contel had failed to comply with its own Notice of Job Opening by adding job requirements during the interviews and by giving controlling weight to those requirements, which were not included in the notice. The arbitrator found that Benson was given the highest rating for the job because of his supervisory/general administrative experience, in spite of the fact that these factors were not mentioned in the Notice of Job Opening. The arbitrator sustained the union's grievance, the position was given to Kirker, and Benson was demoted.

III. *THE STANDARD OF REVIEW*

We review the district court's grant of summary judgment *de novo*. *Ramos v. Southern Md. Elec. Coop.*, 996 F.2d 52, 53 (4th Cir. 1993). Summary judgment under Federal Rule of Civil Procedure 56(c) is appropriate if "there is no genuine issue as to any material fact and. . . the moving party is entitled to a judgment as a matter of law." *See Miller v. Federal Deposit Ins. Corp.*, 906 F.2d 972, 974 (4th Cir. 1990). In making this determination, we view the evidence in the light most favorable to the non-moving party, granting that party the benefit of all reasonable inferences. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574,

587 (1986); *Conkwright v. Westinghouse Elec. Corp.*, 933 F.2d 231, 233 (4th Cir. 1991). "If, however, 'the evidence is so one-sided that one party must prevail as a matter of law,' we must affirm the grant of summary judgment in that party's favor." *O'Connor v. Consolidated Coin Caterers Corp.*, 56 F.3d 542, 545 (4th Cir. 1995) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S.242, 251-52 (1986)).

IV. *DISCUSSION*

A. *The Duty of Fair Representation*

Benson first contends that CWA breached its duty of fair representation in the following three particulars: (1) by initially adopting a strict seniority theory in its handling of the Kirker grievance; (2) by then abandoning its strict seniority theory and asserting in the arbitration that Kirker was as qualified or nearly as qualified as Benson for the service technician position; and (3) by denying Benson notice and an opportunity to participate in the grievance-arbitration process.

Development of the doctrine of fair representation began with *Steele v. Louisville & Nashville R.R.*, 323 U.S. 192 (1944), a case involving unions certified as exclusive bargaining representatives under the Railway Labor Act. The doctrine was extended to unions certified under the NLRA in *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953). Under the fair representation doctrine, a union, as the exclusive bargaining representative of a group of employees, has the duty to represent fairly all of its members, both in collective bargaining and in the enforcement and implementation of any collective bargaining agreement which results. *Vaca v. Sipes*, 386 U.S. 171, 177 (1966). The Supreme Court, in *Air Line Pilots Ass'n Int'l v. O'Neill*, 499 U.S. 65 (1991), established a tripartite standard for determining whether, in a given situation, the duty of fair representation has been breached. Under this standard, a union breaches its duty of fair representation if its actions are arbitrary, discriminatory or in bad faith. *Id.* at 67.

Prior cases have recognized the inevitability of disputes between interests of the union as a whole and interests of individual members. It is well-established that the interests of individual members may sometimes be compromised for the sake of the collective entity. "[T]he complete satisfaction of all who are represented is hardly to be expected." *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180 (1967) (quoting *Ford Motor Co. v. Huffman*, 345 U.S. at 338). Nevertheless, when conflicts arise, the union must make an honest effort to serve the interests of all its members. Therefore, when a union takes a position on behalf of one or more of its members which is necessarily antagonistic to another member, it must act honestly and in good faith. *Humphrey v. Moore*, 375 U.S. 335 (1964). However, a union is accorded considerable discretion in dealing with grievance matters and it may consider the interests of all of its members when deciding how it will deal with the claim of an individual employee. *Garcia v. Zenith Elec. Corp.*, 58 F.3d 1171, 1176 (7th Cir. 1995); *Seymour v. Olin Corp.*, 666 F.2d 202, 208 (5th Cir. 1982). A court should not substitute its judgment for that of the union "even if, with the benefit of hindsight, it appears that the union could have made a better call." *Ooley v. Schwitzer Div. Household Mfg. Inc.*, 961 F.2d 1293, 1302 (7th Cir.), *cert. denied*, 506 U.S. 872 (1992). So long as the union acts in good faith, a court should not intercede on behalf of a disgruntled member. *Barr v. United Parcel Service*, 868 F.2d 36 (2d Cir.) *cert. denied*, 493 U.S. 975 (1989).

Applying these principles to Benson's claim, this court cannot conclude that CWA's duty of fair representation has been breached. The union's actions were neither arbitrary, discriminatory nor in bad faith. The Magistrate Judge found and the district court concluded that the union relied upon an earlier interpretation by an arbitrator of the meaning of "best qualified applicant" which emphasized seniority. Whether that interpretation was binding or not, the union's reliance upon it was certainly not arbitrary, discriminatory, nor in bad faith. A union may handle a grievance in a particular manner for the purpose of benefitting the membership at large. *Griffin v. International Union, United Auto., Aerospace and Agr. Implement Workers of America*, 469 F.2d 181, 183 (4th Cir. 1972). Seniority is a valid, nonarbitrary means of allocating

union benefits. *Kushto v. Brotherhood of Railway, Airline & Steamship Clerks*, 818 F.2d 290, 293 (4th Cir.1987). This conclusion is not adversely impacted by the fact that, in the grievance procedure, CWA went beyond a pure seniority position and bolstered its case with evidence as to the relative qualifications of Kirker as opposed to Benson.

We now turn to Benson's argument that the duty of fair representation was breached by CWA's failure to give him notice of the grievance procedure and an opportunity to participate in it. We find no requirement that notice and an opportunity to participate must be given every time presentation of a grievance may adversely affect a member of the bargaining unit. Upon all the facts and circumstances of a given case, the failure to give notice may be a component of a breach of the duty of fair representation; but, taken by itself, the failure to give notice does not constitute breach of such duty. *Thompson v. International Ass'n of Machinists*, 258 F. Supp. 235, 239 (E.D. Va. 1966). Thus, the court must balance the failure to give notice of the grievance procedure with other relevant factors in each case. Here, Benson was not prejudiced by the lack of notice and an opportunity to participate in the grievance proceeding. As the district court observed, the arbitrator "was fully aware of Benson's qualifications. Benson's proffered testimony would not have impacted the arbitrator's decision based upon his interpretation of the Agreement." (JA at 81.)

Furthermore, it has been held that, in matters involving interpretation of a collective bargaining agreement, the union is not required to offer adversely impacted members notice and an opportunity to participate. *Evangelista v. Inlandboatmen's Union of Pacific*, 777 F.2d 1390, 1397 (9th Cir. 1985). The promotion bypass grievance advanced by CWA on behalf of Kirker was essentially an issue of contract interpretation. This issue was whether the contract language "best qualified senior applicant" required Contel to give the job to the qualified applicant with the most seniority. As the issue before the arbitrator was a matter of contract interpretation, the failure to accord Benson notice and an opportunity to participate in the grievance proceeding did not violate CWA's duty of fair representation.

B. *Alleged Erroneous Outcome of the Grievance Proceeding*

Even if CWA had breached its duty of fair representation, a proposition we reject, the court must not upset the arbitrator's decision unless, as a result of the union's breach, that decision was erroneous. *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 568 (1976); *Ash v. United Parcel Service, Inc.*, 800 F.2d 409, 411 (4th Cir. 1986) (quoting *Hardee v. N.C. Allstate Ins. Services, Inc.*, 537 F.2d 1255, 1258 (4th Cir. 1976)).

Benson argues that, as a result of his failure to be given notice and an opportunity to participate, the outcome of the arbitration was erroneous. Had he been present, Benson contends, he would have testified or argued that his experience with a prior employer met the requirements of the job as posted and gave him qualifications superior to Kirker's. We do not find this argument persuasive. Benson actively assisted Contel in preparation for the arbitration hearing. (JA at 315-18.) Additionally, in defending its decision to select Benson for the job, Contel placed before the arbitrator the relevant facts concerning Benson's prior job experience and qualifications. In fact, Benson testified at his deposition in this case that he provided Contel with everything he could think of to aid in preparation of the case and he knew the company was going to defend its decision to select him for the position. (JA at 325-26.) Thus, the arbitrator had all relevant information before him, and we find no evidence that the outcome of the arbitration was erroneous.

C. *Constitutionality of NLRA § 9 as Applied to Benson*

Lastly, Benson maintains that if CWA did not breach its duty of fair representation upon the facts of this case, NLRA § 9 as applied to him is unconstitutional. The absence of a requirement of notice and an opportunity to be heard under the statute, he argues, renders it repugnant to the First Amendment and to the Due Process Clause of the Fifth Amendment to the Constitution of the United States.

The validity of Benson's constitutional claims depends upon the existence of state action. The First Amendment and the Due Process

Clause protect "individuals only from governmental, not private, action." *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 930 (1982); *Hudgens v. NLRB*, 424 U.S. 507, 513 (1976). In *Bures v. Houston Symphony Soc.*, 503 F.2d 842, 843 (5th Cir. 1974), the court held that a union, in handling a grievance, is not required to employ procedures which satisfy the constitutional guarantee of due process because "a grievance procedure agreement between union and private employer involves no state or federal action . . . ." Since the law is clear that the actions of the union do not constitute state action, Benson's constitutional argument must fail.

Additionally, the Supreme Court has found that the duty of fair representation serves as "a bulwark to prevent arbitrary union conduct against individuals stripped of traditional forms of redress by the provisions of federal labor law." *Vaca v. Sipes*, 386 U.S. at 182. This protection, the Supreme Court indicated, is sufficient to avoid the "grave constitutional problems" which would otherwise be raised by the statutory grant of power to a union to act as the exclusive agent of its members. *Id.* Accordingly, in the labor environment, the duty of fair representation, which we have concluded was not breached here, functions as a substitute for traditional due process protection.

V. *CONCLUSION*

For all of the foregoing reasons, we conclude that the district court did not err in granting CWA's motion for summary judgment and denying Benson's similar motion. Therefore, the decision of the district court is

AFFIRMED.

APPENDIX B

MEMORANDUM OPINION AND ORDER

OF THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF VIRGINIA

October 11, 1994

and

MAGISTRATE JUDGE'S REPORT

AND RECOMMENDATION

June 24, 1994

[866 F. Supp. 910]
James T. BENSON, Plaintiff,

v.

COMMUNICATION WORKERS OF AMERICA and Contel of Virginia, Inc., Defendants.

Civ. A. No. 2:93cv552.

United States District Court,
E.D. Virginia,
Norfolk Division.

Oct. 11, 1994.

* * * *

MEMORANDUM OPINION AND ORDER

MacKENZIE, District Judge.

This matter is before the Court on objections to the United States Magistrate Judge's Report and Recommendation entered on June 24, 1994.

I. *FACTS AND PROCEDURAL HISTORY*

Under § 9(a) of the National Labor Relations Act (NLRA), defendant Communications Workers of America (CWA) was designated as the exclusive representative for a bargaining unit of co-defendant Contel of Virginia, Inc.[1] employees. James Benson, the plaintiff, and Barbara Kirker are and have been members of this bargaining unit of hourly employees at all times relevant to this

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[1] Contel agreed to be bound by the terms of any order or injunction issued by the Court and was relieved of its obligation to appear further in this action by Stipulated Consent Order entered November 11, 1993, by Judge Rebecca Beach Smith.

dispute. CWA and Contel entered into a Collective Bargaining Agreement (the Agreement) that specifies the terms under which the members of this bargaining unit are employed. The Agreement contains a dispute resolution procedure, known as a "grievance," which specifies several steps at which Contel and CWA must meet in an effort to resolve the dispute between themselves, ultimately leading to a hearing before an arbitrator if these steps are unsuccessful.

Upon the posting of a "Notice of Job Opening" for a Service Technician position that had become available, both Benson and Kirker applied for the position. A clause in the Agreement between Contel and CWA required Contel to select the "best qualified senior applicant." Although Kirker had been employed by Contel longer than Benson, Benson was selected for the position. Kirker then filed a grievance with CWA.

Benson brought this action claiming that CWA breached its duty of fair representation owed under § 9(a) of the NLRA in pursuing the interests of Kirker to Benson's detriment. The alleged breach occurred in CWA's pursuit of a promotion bypass grievance on behalf of Kirker without providing Benson notice of or opportunity to be heard at any stage of the grievance or at arbitration. The grievance resulted in an arbitration award in favor of Kirker and in Benson's subsequent demotion. Benson claims that Contel is derivatively in breach of the Collective Bargaining Agreement by following the grievance award and assigning Kirker to the position for which Benson had originally been selected. Benson alternatively claims that, if CWA has met its obligations under the duty of fair representation, then his rights under the First and Fifth Amendments to the Constitution have been violated. Benson seeks declaratory, injunctive, and compensatory relief.

[914]

This case was originally filed on May 28, 1993. On January 10, 1994, both Benson and CWA filed motions for summary judgment. After a hearing on the issues, Magistrate Judge William T. Prince filed proposed recommendations for disposition of the summary judgment motions on June 24, 1994. The Magistrate's

Report and Recommendation recommended that CWA's motion for summary judgment be granted and that plaintiff's motion be denied.

The United States Code provides that if a party serves and files written objections to the Magistrate Judge's Report and Recommendation, the District Judge is required to make a *de novo* determination of those portions of the report to which objection is made, *see* 28 U.S.C. § 636(b)(1), and either affirm, reject, or modify the Magistrate Judge's recommendation.

After plaintiff filed objections to the Report and Recommendation and CWA responded, this Court heard oral arguments on September 23, 1994. The undersigned Senior United States District Judge has examined the record, heard oral argument from both counsel, and has considered the record and objections to the Magistrate Judge's Report and Recommendation *de novo*. For the reasons stated below, the Court agrees with the Magistrate Judge's determinations regarding those portions of the Report and Recommendation to which plaintiff objected. Hence, the Report and Recommendation filed by Magistrate Judge Prince on June 24, 1994 is accepted and affirmed as filed.

II. *DISCUSSION*

A. *Duty of Fair Representation*

The Magistrate Judge found that CWA acted in reliance upon an earlier interpretation of the meaning of "best qualified senior applicant" that had been rendered in an arbitration concerning the same parties to the collective bargaining agreement. The standard to be applied is whether CWA's actions were "so far outside a wide range of reasonableness as to be irrational." *Airline Pilots Ass'n, Int'l v. O'Neill*, 499 U.S. 65, 111 S.Ct. 1127, 113 L.Ed.2d 51 (1991). CWA's reliance on the earlier arbitrator's decision was not arbitrary, and therefore, CWA's pursuit of the Kirker grievance was reasonable, despite the union's indifference to Benson's position. Specifically, the union's duty of fair representation did not require it to do more than articulate and pursue a non-arbitrary interpretation of the Agreement although the successful pursuit of its

interpretation would detrimentally affect one of its members. The Magistrate Judge also analyzed a myriad of cases addressing a union's duty to give notice to adversely affected members and did not find a clear, *per se* rule requiring it.

Benson objected to the Magistrate Judge's finding by arguing that it does not take into account the basic obligation of CWA to represent all employees in the bargaining unit. Since Benson was awarded the position, he had rights under the Agreement which CWA had a fiduciary duty to protect. Benson further argues that CWA's failure to take his interests into consideration and its reliance on the previous arbitrator's decision was unreasonable and arbitrary.

Benson misunderstands the role of a union in its exercise of the power to speak for its employees. It would almost always be impossible for a union to represent all employees after a grievance has been filed. A grievance normally involves parties on opposite sides of an issue and the union could not promote both positions. The union has the right and obligation to advance collective interests, in doing so, it must also choose be-[915]tween sometimes opposing interests. *Humphrey v. Moore*, 375 U.S. 335, 349-50, 84 S.Ct. 363, 371-72, 11 L.Ed.2d 370 (1964). Therefore, the Magistrate Judge correctly rejected the argument that the duty of fair representation prevents the union from forcefully advocating a single interpretation of the Agreement that the union has reasonably determined benefits the group as a whole. CWA did not breach its duty to Benson when it represented Kirker.

Benson also argues that CWA had a duty to provide him with notice and an opportunity to seek to participate in the arbitration. He objects to the Magistrate Judge's finding that there was no duty of fair representation violation because there is no *per se* rule mandating notice and hearing. He states that a reasonably prudent person could not conclude that notice is not required. Benson relies on *Steele v. Louisville and Nashville R.R.*, 323 U.S. 192, 65 S.Ct. 226, 89 L.Ed. 173 (1944) for the proposition that whenever necessary a union must give notice and hearing to its members. However, *Steele* is distinguishable from the present case because the

statement was made in reference to non-union or minority members of the craft, in the context of discrimination. *Steele*, 323 U.S. at 204, 65 S.Ct. at 232-33.

B. *Breach of Contract*

The Magistrate Judge found that in order to prevail, Benson must not only demonstrate a breach of duty by the union, but also show that his demotion was contrary to the contract. However, even if he had found that CWA violated its duty, the arbitration decision was still not erroneous. Benson's argument that he was prejudiced by not being called to participate in the arbitration process was not convincing because the arbitrator's decision shows he was fully aware of the nature of Benson's qualifications. Benson's proffered testimony would not have impacted the arbitrator's decision based on his interpretation of the Agreement.

Benson specifically objects to the breach of contract issue because he was unable to testify before the arbitrator. Benson argues his testimony could have established the relationship between experience and qualifications listed on the job posting and the arbitrator could have ruled in his favor. Further, the testimony of Contel did not adequately present a case for Benson, although he could have explained the connection had he testified.

However, the arbitrator was fully aware of the nature of Benson's qualifications because Benson actively assisted Contel in preparing its case for arbitration. Evidence that Benson says was missing at the arbitration was presented by Contel. Presumably, the arbitrator would be more interested in Contel's assessment of Benson than in Benson's assessment of himself. Furthermore, there is no evidence to indicate that he was inclined to intervene in the arbitration for the purpose of bolstering the Company's case. Benson determined that the best protection of his interests lay in helping Contel prepare its case.

C. *The Constitutional Claim*

Benson asserts as a final theory for relief that if there was no breach of the duty of fair representation in CWA's failure to give Benson notice of and opportunity to participate in the arbitration, then § 9(a) of the NLRA is unconstitutional as applied. The Magistrate Judge concluded that Benson's constitutional arguments are meritless. The heart of Benson's argument is that he is constitutionally entitled to represent himself, independently from his bargaining unit and contrary to the collective bargaining scheme established by Congress in enacting the federal labor laws. It is well-settled, however, that the union's duty of fair representation, prohibiting it from acting arbitrarily, discriminatorily, or in bad faith toward any member, adequately protects the individual's interests.

III. *CONCLUSION*

Upon *de novo* review of the plaintiff's objections to the Magistrate Judge's Report and Recommendation, this Court has determined that plaintiff has failed to show that the arbitrator's decision was erroneous, nor that CWA breached its fiduciary duty. In addition, plaintiff's alternative constitutional claim is meritless. For the foregoing rea-[916]sons, the Report and Recommendation filed by Magistrate Judge Prince on June 24, 1994 is accepted and affirmed as filed. Defendants' motion for summary judgment is GRANTED.

Plaintiff is advised that she may appeal from this final order by forwarding a written notice of appeal to the Clerk of the United States District Court, U.S. Courthouse, 600 Granby Street, Norfolk, Virginia 23510, which said written notice must be received by the Clerk within thirty (30) days of the date of this final order.

It is so ORDERED.

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

PRINCE, United States Magistrate Judge.

Order of Designation

United States District Judge John A. MacKenzie, by an Order entered February 14, 1992, designated the undersigned magistrate judge to conduct a hearing and to submit to a judge of the court proposed recommendations for disposition by the judge of Plaintiff's Motion For Summary Judgment and defendant Communication Workers of America's Motion For Summary Judgment, both filed on January 10, 1994, under Rule 56 of the Federal Rules of Civil Procedure.

A hearing was held on February 15, 1994, at which Edwin Viera, Jr., Esquire, and Hugh L. Reilly, Esquire, appeared for plaintiff; and James B. Coppess, Esquire, Gerard C. Boyle, Esquire, and G. Michael Price, Esquire, appeared on behalf of defendant Communications Workers of America.[1]

Nature of the Case

This case is an action against an exclusive bargaining representative for breach of the duty of fair representation, owed under § 9(a) of the National Labor Relations Act, 29 U.S.C. § 159(a), and derivatively for breach of contract against an employer under § 301 of the Labor Management Relations Act, 29 U.S.C. § 185. Alternatively, if the duty of fair representation has been met, then § 9(a) is alleged to be unconstitutional as applied under the First and Fifth Amendments.

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[1] Contel of Virginia, the other named defendant, agreed to be bound by the terms of any order or injunction issued by the Court and was relieved of its obligation to appear further in this action by Stipulated Consent Order entered November 11, 1993, by Judge Rebecca Beach Smith.

Background

Under § 9(a) of the NLRA, CWA has been designated as the exclusive representative for a bargaining unit of Contel employees. 29 U.S.C. § 159(a). James Benson and Barbara Kirker are and have been members of this bargaining unit of hourly employees at all times relevant to this dispute. CWA and Contel entered into a Collective Bargaining Agreement ["the Agreement"] that specifies the terms under which the members of this bargaining unit are employed. The Agreement contains a dispute resolution procedure, known as a "grievance," which specifies several steps at which Contel and CWA must meet in an effort to resolve the dispute between themselves, ultimately leading to a hearing before an arbitrator if these steps are unsuccessful. Benson has brought this action claiming that the Communications Workers of America ("CWA" or "the union"), his exclusive bargaining representative, breached its duty of fair representation owed under § 9(a) of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 159(a), in pursuing the interests of Kirker to Benson's detriment. The alleged breach occurred in CWA's pursuit of a promotion bypass grievance on behalf of Kirker without providing Benson notice of or opportunity to be heard at any stage of the grievance or at arbitration. The grievance resulted in an arbitration award in favor of Kirker and in Benson's subsequent demotion. Benson claims that Contel is derivatively in breach of the Collective Bargaining Agreement by following the grievance award and assigning Kirker to the position for which Benson had originally been selected. Benson alternatively claims that, if CWA has met its obligations under the duty of fair representation, then his rights under the First and Fifth Amendments to the Constitution have been violated. Benson seeks [917]declaratory, injunctive, and compensatory relief.

Jurisdiction in this Court is proper under 28 U.S.C. §§ 1331 and 1337(a) in that the claims for relief concern the interpretation and application of § 9(a) of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 159(a), an Act of Congress regulating commerce, and the First and Fifth Amendments to the Constitution. The Court also has jurisdiction under § 301 of the Labor Management Relations Act, 29 U.S.C. § 185.

The case is before the Court on motions for summary judgment simultaneously filed by Benson and CWA under Rule 56. The parties agree that there are no material facts in dispute, and each contends entitlement to judgment as a matter of law.[2]

Facts

The material facts of this case are not in dispute. Contel recognizes CWA as the exclusive representative, under § 9(a) of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 159(a), for a bargaining unit comprised of Contel's hourly employees. The unit includes Service Technicians and Facilities Technicians, and Benson and Kirker have been members of the bargaining unit at all times material to this case. As the unit's exclusive representative, CWA entered into a collective bargaining agreement with Contel that covers the employment conditions of the members of the bargaining unit. Contel and CWA have entered into a series of such agreements, including the version at issue in this case which was in effect from February 1, 1990, through January 31, 1993 ("the Agreement"). The Agreement specifies, among other things, the procedures that Contel is required to follow in selecting employees for job assignments and the process for resolving disputes.

On January 18, 1990, Contel posted a "Notice of Job Opening" for a Service Technician position that had opened up at its Virginia Beach facility. (CWA ex. H-1.) The Notice listed "Qualifications" for the position as well as "Additional Qualifications Considered a Plus," and invited interested Contel employees to file an application

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[2] Putting forth a "deference to arbitration theory" that requires the matter be sent back to arbitration for a proper decision based on all the facts, Benson submits that the merits of the Kirker grievance are not appropriate for summary judgment. He contends that "to the extent that CWA defends its actions on the supposed substantive merits of the grievance, CWA is not entitled to judgment as a matter of law." (Pltf's Mem. in opp., docket entry # 21, at 6.) The relevance of this contention will be addressed more fully *infra*, but the record does not contain any disputes of fact. Benson's contention simply points out that it would be inappropriate for the Court to make any finding as to what the arbitrator *would have* found given a full set of facts.

with the Contel Human Resources Representative. A number of employees applied, and the pool of applicants was narrowed to four, including Benson and Kirker. Benson and Kirker were both Facilities Technicians when they applied for the Service Technician position. All four of the applicants were interviewed by a Contel management team comprised of Al Ryder, Laurie Blanton, Gene Lowery, and Joe Ackaway. (Transcript of Arb. Hearing, at p. 42.) Benson was assigned to the position, despite his having less seniority than two of the other applicants.[3]

The key clause of the Agreement required Contel to select the "best qualified senior applicant" for the Service Technician position. "Seniority" is addressed in Article 18, § 18-2, which states in relevant part that "[i]n selecting employees covered by this Agreement for assignments to higher rated non-management classification, the best qualified senior applicant will be considered to fill the particular vacancy." Article 23, entitled "Job Advertisement," § 23-6 states, "When the supervisor and a Human Resources Representative have selected the best qualified senior applicant, no further interviews will be conducted." Kirker was the senior applicant.

The Agreement contains a grievance provision at Article 15, where "grievance" is defined as "a Union claim by an employee and/or Union that the Company has violated a provision of the Agreement and has thereby deprived him of a right or a benefit herein [918]expressly conferred upon him." Article 15 specifies a grievance procedure to be followed by CWA and Contel that encourages the resolution of disputes between them at the earliest step possible. Article 16 of the Agreement allows CWA to refer grievances which are not settled to its satisfaction to an arbitrator for a hearing. CWA pursued a grievance on behalf of Kirker, challenging Contel's selection of Benson. Contel and CWA met at the required steps in the grievance procedure but were unable to resolve the grievance, and CWA submitted a request for arbitration.

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[3] Of these two, Richard Noble could not have been assigned to the position under the terms of the collective bargaining agreement because it would represent a demotion for him.

Arbitrator Norman Harlan was selected to arbitrate the Kirker grievance, and a hearing was held on December 2, 1992. Contel and CWA were represented by counsel at the arbitration hearing, where witnesses were presented and documentary evidence was introduced and witnesses were cross-examined. Benson was not present at the hearing, nor was there any representative present on Benson's behalf.

Before Arbitrator Harlan, CWA took the position that "best qualified senior applicant" required Contel to select Kirker, because Benson had "less seniority and less Contel schooling." (CWA ex. G2-A and G2-B.) CWA argued that a previous arbitration award by Arbitrator Robert J. Ables controlled and required the rejection of Management's contention that it can select the best qualified person, irrespective of seniority. (Harlan dec'n at p. 6.) Contel argued that the Agreement required the selection of the senior applicant only if that applicant is as well qualified or nearly as qualified as the other applicants, and Benson's vast experience in the telecommunications industry gained in his 20 years at RCA gave him superior qualifications that far outweighed Kirker's edge in seniority. (Arb. hearing trans. at p. 9.) Following the hearing, Contel and CWA submitted briefs to Arbitrator Harlan, who sustained the grievance by written decision entered March 20, 1993. Harlan's decision stated that "based upon the evidence and the applicable Contractual language [in the collective bargaining agreement] the Service Technician vacancy should have been awarded to [Kirker]." (Harlan dec'n at p. 40.) Kirker possessed all of the "Qualifications" as well as all of the "Additional Qualifications" listed in the Notice of Job Opening.

Pursuant to this decision, Contel removed Benson from the Service Technician position and replaced him with Kirker, effective March 20, 1993. Benson was returned to his former position as a Facilities Technician, with a correspondingly lower rate of pay.

Benson did not participate or attempt to participate, either on his own behalf or through legal counsel or other representative selected by him, in any stage of the Kirker grievance or the Kirker arbitration. (CWA's Response to Req. for Admission No. 24.)

CWA did not give Benson notice of or an opportunity to participate in:

(i) its decision to pursue the Kirker grievance.
(ii) steps 1-3 of the Article 15 proceedings concerning the Kirker Grievance.
(iii) the selection of the arbitrator to decide the Kirker grievance;
(iv) the Kirker grievance.

(*Id.* Nos. 26-29.) CWA also did not give Benson notice that, in pursuing the Kirker grievance and Kirker arbitration, CWA was advancing and did advance a position contrary to and in conflict with Benson's interests as the person who had been selected by Contel for the Service Technician position. (*Id.* No. 33.) Finally, "CWA did not give Benson notice, advise him, or suggest to him that in pursuing the Kirker grievance and arbitration, CWA was advancing a position contrary to and in conflict with Benson's interests as the person whom Contel had selected for the Service Technician position and that he could or should seek his own legal counsel or other representative with respect to the Kirker Grievance and the Kirker Arbitration." (*Id.* No. 34.)

In short, CWA did not do anything to alert Benson as to its position as to which employee Contel was required to select under the Agreement. Benson did not participate in the grievance and arbitration process, he was not present at the hearing before Arbitrator Harlan, and he did not become aware of the Kirker arbitration hearing until shortly after it was held. (Decl. of J. Benson at p. 2.) As a result of Arbitrator Harlan's decision, Ben-[919]son was removed from the Service Technician's position and returned to the Facility Technician's position that he had previously held. (*Id.*) Up until the time that he was informed of Arbitrator Harlan's decision, Benson was unaware that the successful prosecution of the Kirker grievance and arbitration by CWA could lead to his demotion because he believed that a junior man would have to take the demotion. (*Id*; Benson Dep. at 86.)

Al Ryder, Contel's Facilities Supervisor and a member of the interview team that selected Benson, was among those persons who testified at the Arbitration Hearing. In his deposition, Benson agreed that Ryder was the person in management who was in the best position to know Benson's work attributes. (Benson Dep. at 47.) In addition, Benson knew that Contel's representatives would be going to the arbitration hearing to defend their decision to select him for the Service Technician position, so he provided them with everything that he could think of to aid them in the preparation of the case. He stated that he knew that the Contel representatives "were going to try a case that the outcome would affect me, so I would want to try and prepare them the best I could. So I don't recall leaving anything out." (*Id.*) Benson also stated his belief that, if called to testify at the arbitration hearing, he could have made it clear that he was the more qualified applicant. He would have done so by fleshing out his qualifications in the documents submitted to the arbitrator by providing more information, more specifics, and more particulars about his experience, work history, and qualifications. (*Id.* at 88.)

At the Arbitration Hearing, all of the application packages that Contel considered in evaluating the applicants were submitted into evidence, along with the questions that the Contel representatives asked at the applicant interviews. Also submitted were performance comparisons between Benson and Kirker, the Contel management team's ranking of the candidates, and notes of the selection process. Al Ryder testified as to the details of the selection process, and he stated that Benson was chosen "[b]ased on his previous experience as being a manager for RCA." (Arb. Hearing Trans. at 53.) After providing a detailed description of the Facilities Technician position, Ryder gave specific details as to Benson's previous experience that would be beneficial in the position and made him the superior candidate. Ryder stated that, in evaluating the candidates for the Service Technician position, Contel was looking for someone with the fitness and ability to do this type of work and Benson was "head and shoulders" above the other three candidates. "Benson was much more impressive in his conduct during the interview, his presentation of his answers, his background that he had." (*Id.* at 58.) Moreover, Ryder opined that Benson had a better general

presentation of himself and was more convincing that he knew how to handle the problems that could be expected, and Benson was, overall, "much superior" to the other candidates. (*Id.*)

Contel's internal comparison between the two candidates (CWA Ex. I-5), prepared for the grievance proceedings, showed that both candidates had an identical overall score on their Contel performance evaluations and that Kirker had more Contel training.

Norman Gleichman, the attorney who represented CWA during the Kirker arbitration, did not consider how the outcome of the case would affect Benson, because the union's obligation is to enforce the terms of the contract and the union's position was that the terms of the agreement required the selection of Kirker. (Gleichman Dep. at 18.) Gleichman further declared that because Benson was not a party to the arbitration and, because the purpose of the arbitration is to resolve a dispute between two parties, any attempt by Benson to participate in the arbitration hearing would have been "similar to someone walking off the street into a court room where the person is not a party to the dispute and asking to be heard." (Gleichman Dep. at 53.) Gleichman also stated that this issue had never arisen, so there was no practice on the participation by a non-party in an arbitration proceeding, even where that non-party had a definite interest in the outcome of the arbitration. (Gleichman Dep. at 54.)

[920]*The Motions*

As set forth in Rule 56 of the Federal Rules of Civil Procedure, summary judgment is appropriate when the moving party can show by affidavits, depositions, admissions, answers to interrogatories, the pleadings, or other evidence, that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). The standard for consideration of the parties' motions for summary judgment was recently reiterated in *Tuck v. Henkel Corp.*, 973 F.2d 371, 374 (4th Cir.1992), *cert. denied*, — U.S. —, 113 S.Ct. 1276, 122 L.Ed.2d 671 (1993) (citations omitted):

> Summary judgment is appropriate in those cases where there is no genuine dispute as to a material fact and the moving party is entitled to a judgment as a matter of law. We must draw any permissible inference from the underlying facts in the light most favorable to the party opposing the motion. Summary judgment is appropriate only where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party.

Id. at 374. With this standard in mind, the Court will now address the parties' motions.

Discussion

I. The First and Third Claims

Benson's basic complaint is that CWA breached its duty of fair representation in pursuing the Kirker grievance without providing Benson notice and an opportunity to participate, leading to Contel's derivative breach of the collective bargaining agreement in implementing the arbitrator's award, which was erroneous and tainted by CWA's breach. Clarifying his position, Benson's Amended Complaint alleges that the Arbitration Award was erroneous in finding that Kirker was as qualified or nearly as qualified as Benson. (Amended Complaint at ¶ 8A.) Benson further alleges that CWA's failure to give Benson notice of and an opportunity to participate in the grievance and arbitration process contributed to this erroneous decision, in that Arbitrator Harlan was not presented with crucial testimony from Benson concerning his experience. (Amended Complaint at ¶ 8B.)

In his First Claim for Relief, Benson alleges that CWA failed to represent Benson at all stages of the grievance and arbitration process, and failed to provide him with and deprived him of an opportunity to be heard at any stage of the grievance and arbitration process. Benson claims that these actions were arbitrary and without rational basis, constituting a *per se* violation of the duty of fair representation.

Similarly, in his Third Claim, Benson alleges that CWA violated its duty of fair representation to him, or abridged his constitutional rights, by denying him notice of and an opportunity to be heard on its actions. Benson claims that, under these circumstances, the grievance, its referral to arbitration, and the Arbitration Award all violated the Collective Bargaining Agreement. Benson further alleges that he would prevail on the merits of the grievance were the grievance heard in a fair hearing in any forum. Finally, he claims that both CWA and Contel are in violation of the Collective Bargaining Agreement by relying on and enforcing the erroneous Arbitration Award to Benson's detriment.

Benson's claim presents a "hybrid" fair representation/breach of contract claim against the union and the employer. *See Del Costello v. International Brotherhood of Teamsters*, 462 U.S. 151, 103 S.Ct. 2281, 76 L.Ed.2d 476 (1983). The claim against CWA is for breach of the duty of fair representation, and the derivative claim against Contel is for breach of contract in that Contel has violated the Agreement by enforcing the erroneous arbitration award. See 29 U.S.C. § 159(a); 29 U.S.C. § 185. Congress has specified in § 203(d), 29 U.S.C. § 173(d), that "(f)inal adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes." In a case such as this, where the collective bargaining agreement provides a procedure for the settlement of disputes between the employer and the union through discussion and arbitration, the settlement reached at arbitration will be binding and respected by the courts unless there is substantial reason to believe that a breach of [921]duty by the union contributed to an erroneous decision. *See Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 568, 96 S.Ct. 1048, 1058, 47 L.Ed.2d 231 (1976). A § 301 suit against the employer and a fair representation claim against the union are "inextricably interdependent." *United Parcel Service, Inc. v. Mitchell*, 451 U.S. 56, 66-67, 101 S.Ct. 1559, 1565-66, 67 L.Ed.2d 732 (1981) (Stewart, J., concurring in the judgment). In order to prevail and avoid the Arbitrator's interpretation of the Agreement, Benson must show both that his demotion was contrary to the Agreement and that the union breached its duty to him. *Chauffeurs, Teamsters and Helpers, Local No. 391 v. Terry*, 494 U.S. 558, 564, 110 S.Ct.

1339, 1344, 108 L.Ed.2d 519 (1990); *Del Costello v. Teamsters*, 462 U.S. 151, 164-65, 103 S.Ct. 2281, 2290-91, 76 L.Ed.2d 476 (1983); *Hines*, 424 U.S. at 571, 96 S.Ct. at 1059-60. Benson thus must show that CWA breached its duty of fair representation to him, that Arbitrator Harlan's decision was erroneous as a result, and that the CWA's breach substantially contributed to the erroneous decision.

A. The Duty of Fair Representation

The general standard governing a union's conduct as exclusive representative is that it owes all members of the bargaining unit the duty of fair representation, which is breached by the union only if its conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith. *Vaca v. Sipes*, 386 U.S. 171, 87 S.Ct. 903, 17 L.Ed.2d 842 (1967). The Supreme Court recently clarified the breadth of this duty:

> We hold that the rule announced in *Vaca v. Sipes*, 386 U.S. 171, 190 [87 S.Ct. 903, 916-17, 17 L.Ed.2d 842] (1967)—that a union breaches its duty of fair representation if its actions are either "arbitrary, discriminatory, or in bad faith"—applies to all union activity, including contract negotiation. We further hold that a union's actions are arbitrary only if, in light of the factual and legal landscape at the time of the union's actions, the union's behavior is so far outside a "wide range of reasonableness," *Ford Motor Co. v. Huffman*, [345] U.S. 330, 338, 73 S.Ct. 681, 686, 97 L.Ed. 1048 (1953), as to be irrational.

Air Line Pilots Ass'n, Int'l v. O'Neill, 499 U.S. 65, 111 S.Ct. 1127, 113 L.Ed.2d 51 (1991). The union's conduct in pursuing the Kirker grievance and arbitration in opposition to Benson's interest in holding the Service Technician position must therefore be evaluated in the light of this highly deferential standard.

With this standard in mind, Benson claims that, in pursuing the Kirker grievance, CWA took actions that were adverse to Benson's employment interests, and in failing to provide Benson with notice and an opportunity to be heard, CWA's actions were "arbitrary and

without rational basis," in violation of its duty. (Amended Complaint, at ¶¶ 11-13.) The central issue is thus whether CWA's failure to give Benson notice of and an opportunity to be heard on the Kirker grievance and arbitration was "so far outside a wide range of reasonableness as to be irrational" under *O'Neill*.

The union not only has the right but also the obligation to advance the collective interests of all of its members, and in doing so must necessarily choose between sometimes opposing interests. *Humphrey v. Moore*, 375 U.S. 335, 349-50, 84 S.Ct. 363, 371-72, 11 L.Ed.2d 370 (1964). A "union may ... handle [a] grievance in a particular manner for a multitude of reasons," most especially for the purpose of "benefitting the membership at large." *Griffin v. Automobile Workers*, 469 F.2d 181, 183 (4th Cir.1972). Among the permissible reasons that a union may adopt in pursuing a grievance is the furtherance of the union's "legitimate interest in presenting a united front ... and in not seeing its strength dissipated and its stature denigrated by [individuals] within the unit separately pursuing what they see as separate interests." *Emporium Capwell Co. v. Western Addition Community Org.*, 420 U.S. 50, 70, 95 S.Ct. 977, 988, 43 L.Ed.2d 12 (1975). CWA's pursuit of an interpretation of the Agreement that favored seniority was not behavior "so far outside a wide range of reasonableness as to be irrational" under *O'Neill*, despite the inevitable harm to one employee for the benefit of another.

[922]The true thrust of Benson's complaint, however, is not that CWA acted arbitrarily by merely pursuing an interest adverse to him, but rather that CWA acted arbitrarily in the manner in which it pursued that position. The central issue is whether CWA's pursuit of the Kirker grievance and arbitration, without ever giving Benson notice of or an opportunity to be heard on the proceedings, either before CWA itself or before Arbitrator Harlan, violated its duty of fair representation. In other words, the question is whether the union's duty of fair representation required it to do more than articulate and pursue a non-arbitrary interpretation of the collective bargaining agreement when the successful pursuit of its interpretation would detrimentally affect one of its members.

The union's duty to give notice to adversely affected members has been addressed in a number of decisions, but no clear rule establishing notice as a *per se* rule has emerged. For example, the Fourth Circuit has held that a breach of the duty of fair representation may be found where the union drops a grievance that it had been pursuing on behalf of a member without giving that member notice, even where the grievance itself was dropped for permissible good faith reasons. *Harrison v. United Transportation Union*, 530 F.2d 558, 561 (4th Cir.1975), cert. denied, 425 U.S. 958, 96 S.Ct. 1739, 48 L.Ed.2d 203 (1976). In *Harrison*, however, the union's constitution and by-laws required that the employee receive notice so that he could pursue an appeal on his own, and the Court held that a conscious decision by the union not to give such notice would therefore constitute arbitrary action. *Id.* at 561-62. There is no similar notice requirement in the present case, nor would Benson have had any such opportunity to pursue an appeal on his own under the terms of the Agreement.

As authority directly addressing the issue of whether CWA violated its duty of fair representation by not providing Benson with notice, Benson offers and relies heavily upon *Clark v. Hein-Werner Corp.*, 8 Wis.2d 264, 99 N.W.2d 132 (1959), *cert. denied*, 362 U.S. 962, 80 S.Ct. 878, 4 L.Ed.2d 877 (1960). In *Clark*, the Supreme Court of Wisconsin held that an arbitration award should not be binding upon certain adversely affected employees whose interests were diametrically opposed to the position espoused by the union where those employees were not given notice of the arbitration hearing. The issue at arbitration concerned the interpretation of the seniority clause of a collective bargaining agreement, and the union's successful pursuit of its position resulted in the demotion of several employees. The Court held "where the interests of two groups of employees are diametrically opposed to each other and the union espouses the cause of one in the arbitration, it follows as a matter of law that there has been no fair representation of the other group.... even though ... the union acts completely objectively." 99 N.W.2d at 137. The Wisconsin Court further declared that, even though the employer's position at arbitration was identical to the plaintiff's, "the plaintiffs were entitled to notice of the hearing,

and an opportunity to intervene, as a matter of sound labor policy." *Id.* at 138.

In *Miller Brewing Co. v. Brewery Workers Local Union No. 9*, 562 F.Supp. 1368 (E.D.Wis.1983), the district court declared that "*Clark* is not good law." *Id.* at 1373 *aff'd in part* and *rev'd in part* on other grounds, 739 F.2d 1159 (7th Cir.1984), cert. denied, 469 U.S. 1160, 105 S.Ct. 912, 83 L.Ed.2d 926 (1985). *Miller* noted that *Clark* was decided seven years before the United States Supreme Court announced the current standard for evaluating the union's execution of its duty in *Vaca*, under which the union breaches its duty of fair representation only where its conduct toward a member is "arbitrary, discriminatory, or in bad faith." *Id.*, citing *Vaca*, 386 U.S. 171, 87 S.Ct. 903. Benson argues that in deciding *Miller*, the court misread *Clark*, and that, by holding that the absence of notice "offend[ed] the court's sense of justice and fair play," the Wisconsin court implicitly condemned the union's conduct as arbitrary. (Pltf.'s Reply, Docket Entry # 23, at 7.) Benson's reasoning is not convincing. The *Clark* decision clearly rests on a rationale that has been extinguished by the Supreme Court's subsequent decisions in this area that find the union does not breach its duty of fair representation where it takes a "good faith position contrary to that of [923]some individuals whom it represents nor in supporting the position of one group of employees against that of another." *Humphrey*, 375 U.S. 335, at 349, 84 S.Ct. 363, at 371. Since "[c]onflict between employees represented by the same union is a recurring fact" and gagging the union would weaken the collective bargaining and grievance process, the union "must be free to take a position" on significant disputes and should not be neutralized when the issue is between two sets of employees. *Id.* at 349-50, 84 S.Ct. at 371-72. "The collective bargaining system ... subordinates the interests of an individual employee to the collective interests of all employees in a bargaining unit." *Vaca*, 386 U.S. at 182, 87 S.Ct. at 912; *Dunlap v. United Transp. Union*, 826 F.Supp. 957, 960 (E.D.Va.1992), *aff'd sub nom. Lorello v. United Transp. Union*, 993 F.2d 1537 (4th Cir.1993).

The dissenting opinion in *Clark* points out an additional deficiency in the majority's holding. By requiring that notice be given to adversely affected employees in order for an arbitration decision to be binding upon them, the majority essentially imposed a new procedural requirement upon labor arbitrations. Justifying its new rule on what it deemed to be "in the best interests of sound public policy," the majority's reasoning was suitably criticized by the dissent as an exercise in legislation. *Clark*, 99 N.W.2d at 140 (Fairchild, J.) Accordingly, *Clark* is not persuasive, and Benson's advocacy of its reasoning should be rejected.

Benson also urges the Court to follow the reasoning in *Smith v. Hussmann Refrigerator Co.*, 619 F.2d 1229 (8th Cir.1980) (*en banc*), *cert. denied*, 449 U.S. 839, 101 S.Ct. 116, 66 L.Ed.2d 46 (1980), a more recent decision involving similar facts. Having generated four opinions by six Judges, however, *Smith* is not a persuasive precedent. The case involved a jury trial on the issue of whether a union had violated its duty of fair representation in pursuing grievances on behalf of one group of employees that adversely impacted another group of employees and in failing to give the adversely affected group the opportunity to participate in the grievance proceedings.

As Benson emphatically points out, the plurality opinion in *Smith* stated that "failure to invite the plaintiffs to the arbitration hearing may have left them inadequately represented regarding a crucial factor in the dispute." *Id.* at 1242. This was so because the arbitrator clearly viewed the employees' experience as determinative in his decision regarding relative skill and ability, and the court "inferred that plaintiffs would ... be able to relate their outside work experience better than the company representative." *Id.* This part of the opinion was not, however, joined by any of the other five judges on the panel. In fact, the three concurring judges found no breach of the union's duty in its handling of the arbitration hearing itself. They reasoned that the union's post-hearing agreement with the employer to return to the arbitrator for a reconsideration of the decision without notice to the plaintiff sufficiently evinced the union's lack of good faith to support the jury's verdict that the union had breached its duty of fair representation. *Id.* at 1246-47.

The two Judge dissent attacked the majority's holding as precluding the union from representing senior employees against junior employees who have been selected by the company for their skill and ability, unless the union "first conducts an internal hearing or an intensive investigation to determine whether, in fact, the senior employees' skill and ability is substantially equal to that of the junior employee." *Smith*, 619 F.2d at 1250. *Smith* thus does not persuasively support Benson's position that the union breached its duty by failing to provide him notice of the proceedings. *But see Barnard v. Commercial Carriers, Inc.*, 863 F.2d 694, 699 (10th Cir.1988) ("All parties in an arbitration proceeding are entitled to notice and an opportunity to be heard," including adversely affected employees.) (citations omitted), and *id.* at 699, Seymour, C.J., concurring (the union breached its duty of fair representation by failing to notify the affected employee of the grievance proceeding or inviting him to attend, citing *Smith v. Hussmann*, 619 F.2d at 1241.)

In *Ramsey v. NLRB*, 327 F.2d 784 (7th Cir.) *cert. denied*, 377 U.S. 1003, 84 S.Ct. 1938, 12 L.Ed.2d 1052 (1964), the Seventh [924]Circuit declared that "[t]here is no statutory or constitutional right to be present at an arbitration hearing," rejecting the employee's contention that his rights were denied since he was not given notice of the arbitration hearing and did not appear there. The court specifically noted that the facts showed "that the company fully and adequately defended [the employee's] rights at the hearing." *Id.* at 788. In other words, the employee was not prejudiced by lack of notice of the arbitration because his employer fully presented the employee's case at the hearing, and the union thus had not breached its duty to the employee.

More recently, the Ninth Circuit has declared that "a Union does not breach its duty of fair representation by failing to give a grievant notice and an opportunity to attend a grievance hearing where the issue is the proper construction of a collective bargaining agreement." *Evangelista v. Inlandboatmen's Union of the Pacific*, 777 F.2d 1390, 1397 (1985) (citations omitted). Once again, the court specifically noted that the employee "was not prejudiced by her inability to attend the [grievance] meeting" because she admitted

that all the information that she wanted considered had been provided and she could not have added relevant information. *Id.*

As the decisions discussed above demonstrate, there is no absolute requirement that a union inform its adversely affected members of its grievance activities. The cases indicate that a lack of notice may be indicative of a union's indifference to its employees' interests and thus constitute a breach of duty if the union's breach causes an error in the arbitration process. "If a union representative makes no effort to communicate with the persons directly affected by its action and takes action without investigation or adequate notice and opportunity to be heard, these acts and omissions may constitute a breach of duty of fair representation." *NLRB v. American Postal Workers Union*, 618 F.2d 1249, 1255 (8th Cir.1980). As noted even in *Smith*, "a union's failure to inform an employee whose interests are before an arbitrator of the arbitration hearing is not necessarily sufficient to support a claim of unfair representation," and the courts have therefore "carefully searched the records for prejudice to the employee. When the position of the employee has been adequately presented, no breach has been found." 619 F.2d 1229, 1241; see also *Warehouse Union, Local 860 v. NLRB*, 652 F.2d 1022, 1025 (D.C.Cir.1981) (union's failure to inform its members of certain information was "clearly arbitrary conduct and a breach of duty" where this information was directly relevant to a decision that the members themselves had to make).

As Benson notes, most of the cases dealing with the union's breach of its duty of fair representation concern actions brought by the grievant, complaining about the union's refusal to pursue a grievance or deficiency in pursuing the grievance. In this case, by contrast, the union effectively pursued the grievance, but its pursuit happened to detrimentally impact another member without affording him an opportunity to defend himself. The National Labor Relations Board addressed a similar set of facts in *Washington-Baltimore Newspaper Guild*, 239 N.L.R.B. 1321, 1979 WL 8651 (N.L.R.B.) (1979). A senior employee, Washington, had been bypassed for a promotion in favor of a junior employee, Kelly, on the basis of the employer's determination that the junior employee

was more qualified. The union pursued a grievance on behalf of Washington, alleging that the bargaining agreement required the promotion of the senior employee when both candidates were at least minimally qualified. The grievance was eventually submitted to arbitration without affording Kelly an opportunity to present his position. In his action against the union for breach of its duty to fairly represent him, Kelly argued that the union was required to give him an opportunity to show why he was more qualified for the position than Washington. The NLRB held that, since the controlling provision of the agreement had never been authoritatively interpreted, the union's first task in deciding whether to pursue Washington's grievance was to determine the proper interpretation of that provision. The Board held the interpretation advanced by the union was as reasonable as that advanced by the employer, and a choice of either theory would have placed the union on the side of one and against the [925]other applicant, so the union was entitled to pursue its interpretation and was not required to consult those who might be adversely affected. *Id.* at *2. The Board interpreted the agreement to require that promotions be based on seniority when the qualifications of the applicants were "relatively equal," thus making qualifications relevant, but the Board nevertheless dismissed Kelly's complaint that the union breached its duty by not consulting him concerning his qualifications. The Board specifically noted, however, that had there already been established an interpretation that relative qualifications were the primary consideration, however, then the union would, "of course, have been obliged to consider the relative qualifications of the two applicants." *Id.* at *3.

In the present case, CWA was at least as justified in not consulting Benson, since CWA was relying on the language in Arbitrator Able's previous arbitration decision concerning the interpretation of the precise clause at issue. Although Arbitrator Harlan did find that the earlier decision was not *res judicata* in the present case, CWA's reliance on the earlier decision was reasonable.

The Court thus concludes that, since CWA was acting in reliance upon an earlier interpretation of the meaning of "best qualified senior applicant" that had been rendered in an arbitration

concerning the same parties to the collective bargaining agreement, CWA's pursuit of the Kirker grievance was reasonable, despite the union's indifference to Benson's position. The fact that the language in the earlier decision was merely *dicta* does not undermine the reasonableness of CWA's reliance upon that interpretation. In the words of CWA's representative Norman Gleichman, there was "nothing that Benson could have said that would have made any difference" to CWA's interpretation of the "best qualified senior applicant" clause. CWA's position rendered Benson's allegedly superior qualifications irrelevant by requiring the selection of the senior applicant if she was qualified. CWA's indifference to Benson's qualifications was not "so far outside a wide range of reasonableness" as to be irrational, and there has been no serious contention that CWA's actions were discriminatory or in bad faith, under the standard announced in *Vaca* and clarified in *O'Neill*. *See also Dunlap*, 826 F.Supp. 957, 960. The Court FINDS that, on these facts, CWA did not breach its duty to fairly represent Benson.

B. Breach of Contract

As stated previously, to prevail in this hybrid fair representation/§ 301 action, Benson must not only demonstrate a breach of duty by the union, but must also show that his demotion was contrary to the contract. *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. at 570-71, 96 S.Ct. at 1059-60. In order to overturn an arbitration decision, an employee must establish that there is "substantial reason to believe that a union breach of duty contributed to [an] erroneous outcome of the contractual proceedings." *Id.* at 568, 96 S.Ct. at 1058; *Ash v. United Parcel Service, Inc.*, 800 F.2d 409, 411 (4th Cir.1986). The "contractual proceedings" referred to are the arbitration proceedings specified in the Agreement.

In addition to finding that Benson has not shown that the union breached its duty, the Court concludes as an alternative basis for denying Benson's motion for summary judgment on the First and Third claims that Benson has failed to show an erroneous outcome in the arbitration proceedings, even if the Court had found that CWA had violated its duty.

The question is thus whether the absence of Benson's testimony from the proceedings,[4] testimony from this applicant whom Contel's management team found so convincing and so articulate, so undermined the integrity of the arbitration hearing as to render the arbitration decision erroneous. Benson argues that by precluding his participation, the arbitration process produced an erroneous decision because he could have offered testimony [926]that would have been highly material to the arbitrator's decision. He contends that the relative qualifications of Kirker and himself were the pivotal facts in issue at the arbitration hearing and that "Arbitrator Harlan was not presented with the key testimony from Benson concerning his (Benson's) experience with a previous employer that made him substantially more qualified for the position than Kirker." (Pltf.'s Mem. in Opp., Docket Entry # 21, at 2.) Had he testified, he could have explained how his "supervisory experience and his experience in construction ... with other employers" in fact did provide him with qualifications superior to Kirker's with respect to the requirements on the job posting. (Pltf.'s Mem. in Support of Pltf.'s Motion, at 30; *see* Declaration of James T. Benson, docket entry # 14.) Benson also believes that the arbitration decision indicates that

> Arbitrator Harlan did not consider Contel's presentation convincing. However, Arbitrator Harlan was not presented with a clear and detailed explanation of how my background and experience with my prior employer (RCA) made me more qualified than Barbara Kirker for the posted Service Technician position.

(Declaration of Benson at 4.) Benson's argument that he was prejudiced by not being called to participate in the arbitration process is not convincing, in light of Arbitrator Harlan's reasoning in the arbitration decision. Accepting Benson's argument that he could have presented his superior qualifications in a manner that

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[4] The parties vehemently contest whether Benson would have been entitled to intervene in the arbitration hearing on his own behalf. The Court offers no opinion on this issue, but assumes that Benson would have been permitted at least to testify on his own behalf at the arbitration hearing had he attempted to intervene.

would have been far more convincing than the manner in which Contel's management presented them, Benson still has failed to show that the arbitrator's decision was erroneous.

Benson's argument ignores Arbitrator Harlan's reasoning, which focused on Contel's decisionmaking process in selecting Benson. Harlan emphasized Contel's obligation to make its selection based on the qualifications stated in the "Notice of Job Opening" that Contel itself created. In relying on Benson's previous experience with another employer, Contel essentially created qualifications for the Service Technician position that were not listed in the Notice. Noting that management has the right to determine the method to be used in determining qualifications, Arbitrator Harlan held that "[i]t is fundamental that in determining who is selected, Management is limited in its inquiry to the qualifications stated on the job posting." (Harlan decision at p. 19.)

Harlan's decision shows that he was fully aware of the nature of Benson's superiority. He simply found that Contel was not entitled to rely on this aspect of Benson's superiority so as to bypass Kirker in favor of Benson. Harlan's analogy is particularly apt to illustrate his reasoning:

> [A]ssume an employer posted a job which required only a chauffeur's license but in interviewing applicants it found one applicant had a CDL (Commercial Driver's License) and awarded the job to that applicant on the basis he was "best qualified." Obviously it would be adding a requirement not stated on the posting. In our Case, Management admittedly gave considerable weight to Jim Benson's supervisory experience and his experience in construction even though neither was listed on the Posting as being either a primary or a secondary requirement.

(Harlan dec'n at p. 19.)

Arbitrator Harlan determined that the "best qualified senior applicant" language is ambiguous and open to interpretation, and he refused to clarify precisely the weight to be accorded to seniority

and relative qualifications under the award. (Harlan dec'n at p. 23.) He did, however, hold Contel to its interpretation of the clause as meaning that "the senior qualified applicant gets the job if he/she is as *well qualified* or *nearly as qualified* as other applicants." Although relative qualifications thus became an issue at the arbitration hearing, Arbitrator Harlan's reasoning demonstrates that Benson's proffered testimony would have been superfluous. Harlan focused on the decisional process of Contel's management team that made the selections, and he determined that their testimony indicated that Benson's experience with other employers was a major factor in his being rated the highest. Benson's proffered testimony would have merely described his outside experience in greater detail.

[927]Benson's proffered testimony would not have impacted Arbitrator Harlan's decision, based on his interpretation of the agreement, and, despite Benson's absence from the proceedings, there is no substantial reason to believe that any breach of duty by CWA contributed to an erroneous outcome in the proceedings. Accordingly, the Court FINDS that, on the First and Third Claims, Benson's motion for summary judgment should be DENIED, and CWA's motion for summary judgment should be GRANTED for this additional reason.

II. The Constitutional Claims

Benson's alternative theory for relief, stated in the Second Claim of the Complaint, alleges that if there was no breach of the duty of fair representation in CWA's failure to give Benson notice of and opportunity to participate in the Kirker arbitration, then § 9(a) of the NLRA is unconstitutional as applied. Specifically, Benson claims that CWA's use of its authority in taking action adversely affecting him without giving him notice and an opportunity to be heard abridges Benson's right to free association under the First Amendment and deprives him of due process of law under the Fifth Amendment, and § 9(a) is therefore unconstitutional as applied. (Complaint ¶ 16.)

CWA presents a twofold response, both in its own motion for summary judgment and in opposition to Benson's. First, CWA argues that the specific purpose of the duty of fair representation is to preserve the constitutionality of the federal labor statutes, and the individual interests of represented employees are properly protected by the requirement that the union refrain from acting in an arbitrary, discriminatory, or bad faith manner. Second, CWA contends that, even if the duty of fair representation does not adequately cover all potential constitutional concerns, the Constitution does not apply directly to restrict CWA's activities, because CWA is not a state actor.

Benson's constitutional arguments are meritless. Benson relies heavily upon *Steele v. Louisville and Nashville R.R.*, 323 U.S. 192, 65 S.Ct. 226, 89 L.Ed. 173 (1944), where the Court first announced the union's duty of fair representation in the context of a union's discrimination against minority members of the bargaining unit on the basis of race. Although the Court alluded to constitutional concerns that would arise in the absence of any duty on the part of the union to consider the interests of the minority, the Court avoided addressing the constitutional issues by basing its decision on the terms of the federal statute. 323 U.S. at 198-99, 65 S.Ct. at 230. The Court reasoned that if the statute conferred exclusive bargaining authority on a union "without any commensurate statutory duty toward its members, constitutional questions [would] arise." *Id.* at 198, 65 S.Ct. at 230.

The Court averted these constitutional questions by finding that Congress, in granting the labor union the authority to act on behalf of a group of employees, did not intend to "confer plenary power upon the union to sacrifice, for the benefit of its members, rights of the minority of the craft, without imposing on it any duty to protect the minority." *Id.* at 199, 65 S.Ct. at 230. "The statute imposes upon the ... representative ... at least as exacting a duty to protect equally the interests of the members of the craft as the Constitution imposes upon a legislature to give equal protection to the interests of those for whom it legislates." *Id.* at 202, 65 S.Ct. at 232. The union's power to act as the class representative is accompanied by the "duty to exercise fairly the power conferred upon it in behalf of

all those for whom it acts, without hostile discrimination against them." *Id.* at 202-203, 65 S.Ct. at 232. The constitutional issues raised by Benson are thus obviated by the duty of fair representation, which adequately protects any infringement on his constitutional rights that accompanies his being required to accept the union as his exclusive representative.

CWA also contends that Benson's constitutional claims must fail for the additional reason that there is no government action involved in a union's pursuit of a grievance, and CWA's actions here are therefore not subject to constitutional restraints. Thus, the validity of Benson's First and Fifth Amendment claims depends upon the exis-[928]tence of state action. *See, e.g., Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 930, 102 S.Ct. 2744, 2750, 73 L.Ed.2d 482 (1982) (due process clause protects individuals from governmental and not private action); *Hudgens v. NLRB*, 424 U.S. 507, 513, 96 S.Ct. 1029, 1033, 47 L.Ed.2d 196 (1976) (First Amendment guarantee is only against abridgement by the government). To find state action, "the conduct allegedly causing the deprivation of a federal right [must] be fairly attributable to the state." *Lugar*, 457 U.S. at 937, 102 S.Ct. at 2753.

Once again, Benson relies heavily on *Steele* in support of his contention that CWA's acts as Benson's exclusive representative involve state action. As discussed above, however, *Steele* did *not* hold that the granting of authority by Congress upon the union to act as an exclusive representative converted the union into a state actor. On the contrary, in a torrid concurring opinion, Justice Murphy reprimanded the Court for "remaining mute and placid as to the obvious and oppressive deprivation of constitutional guarantees" shown by the union's racially discriminatory decisions, demanding "the invocation of constitutional condemnation." *Steele*, 323 U.S. at 234-35, 65 S.Ct. at 201- 02. Justice Murphy's dissent thus demonstrates the fallacy in Benson's reliance on *Steele* for finding state action, and Benson's contention that "*Steele* is dispositive on the issue of governmental action" is thus not persuasive. (*See* Benson Mem. in Opp., docket entry # 21, at 26-27.)

The parties have additionally cited and disputed the significance of a number of decisions that address constitutional concerns and the state action question where a statutory grant of authority has empowered a private party to take action that it could not take in the absence of the grant of empowerment. *See, e.g., Kidwell v. Transportation Communications Intl Union*, 946 F.2d 283, 297 (4th Cir.1991) ("To raise the First Amendment argument, the union's actions must constitute state action. We are inclined to believe, however, that no state action exists outside of the narrow area of those actions taken by the union as the collective bargaining representative."), *cert. denied*, — U.S. —, 112 S.Ct. 1760, 118 L.Ed.2d 423 (1992). CWA's response is that CWA's actions in this context do not qualify as "state action" and thus are not subject to constitutional constraints.

In *Andrews v. Federal Home Loan Bank*, 998 F.2d 214 (4th Cir.1993), the Fourth Circuit explained the four contexts in which a private party can be deemed a state actor and thus subject to constitutional limitations. *Andrews* involved a federal bank employee's claim that he was fired in violation of his First Amendment rights. Although the case concerned a bank rather than a union and thus did not involve any issue under the NLRA, the court presents an enlightening discussion of the state action inquiry in finding that the Federal Home Loan Bank was not a government actor when it discharged one of its employees:

> In certain circumstances, a private actor can still be bound by constitutional limitations because its "conduct is fairly attributable to the state." *Arlosoroff v. National Collegiate Athletic Ass'n*, 746 F.2d 1019, 1021 (4th Cir.1984) (footnote omitted). In order to show state action by a private entity, however, it must be demonstrated that "the private party charged with the deprivation could be described in all fairness as a state actor." *Edmonson [v. Leesville Concrete Co.*, 500 U.S. 614, 620-22, 111 S.Ct. 2077, 2083, 114 L.Ed.2d 660 (1991)] (citation omitted). A private party can be deemed a state actor in four contexts: (1) when the state has coerced the private actor to commit an act that would be unconstitutional if done by the state; (2) when the state has sought to evade a clear constitu-

> tional duty through delegation to a private actor; (3) when the state has delegated a traditionally and exclusively public function to a private actor; or (4) when the state has committed an unconstitutional act in the course of enforcing a right of a private citizen. If the conduct does not fall into one of these four categories, then the private conduct is not an action of the state.

998 F.2d at 217. Benson argues that the second category listed in *Andrews* applies, involving cases "in which the government has delegated responsibility to a private party for [929]conduct that would be unconstitutional if done by the government." *Id.* at 218 (Benson's Mem. in Opp. at 30-31.). Benson argues that NLRA § 9(a) delegates to CWA the power to divest employees such as Benson of property rights in employment, and therefore converts CWA into a governmental actor. Benson's argument completely misapplies this category of governmental action, as explained in *Andrews*, because this category applies only to situations in which government has some affirmative constitutional duty that it has delegated to a private entity. When the government has not delegated a duty affirmatively imposed upon it by the Constitution, there is no state action if the actions are taken by a private entity. *Id.* at 218. Benson cites this category of state action to support his incongruous argument that "were the government itself to act as Benson's exclusive representative, and prosecute the Kirker grievance through arbitration, it would have to provide Benson with notice and an opportunity to be heard." (Pltf.'s Mem. in Opp., Docket Entry # 21, at 31.) This argument merely restates the obvious proposition that *government* action is subject to constitutional limitations. Benson completely fails, however, to point out any constitutional *duty* of the federal government delegated to CWA and pursuant to which CWA prosecuted the Kirker grievance. CWA's conduct in pursuing the Kirker grievance does not fall into any of the other categories of state action discussed in *Andrews*, nor does Benson attempt to fit it into any of those categories.

Benson also argues that if CWA's failure to provide Benson with notice and hearing does not amount to arbitrary conduct in violation of the duty of fair representation, then § 9(a) of the NLRA

is unconstitutional as applied because it violates the Due Process Clause of the Fifth Amendment. (Benson's Mem. in Opp., docket entry # 21, at 35.) Once again, Benson's position is undermined by his reliance on *Steele* and the question of state action. Aside from *Steele*, Benson offers only two decisions in support of this argument. The first, *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 59 S.Ct. 206, 83 L.Ed. 126 (1938), held only that the validity of the NLRA would be brought into question in the absence of a requirement that the National Labor Relations Board give notice and hearing to a union that faced the loss of contractual rights as the result of an NLRB proceeding to which it was not a party. The Court held that the NLRA itself required notice and hearing in this situation, although Benson makes the illogical contention that the Court would not have ruled against the NLRB on nonconstitutional grounds "unless the Court believed that to construe the NLRA any other way would be constitutionally invalid." (Benson Mem. in Opp., docket entry # 21, at 36.) Benson's conclusion not only represents a huge leap in reasoning, it infers a constitutional basis for the decision that is not supported by the language of the opinion.

Similarly inapt is Benson's reliance on *Silver v. New York Stock Exchange*, 373 U.S. 341, 83 S.Ct. 1246, 10 L.Ed.2d 389 (1963), in which the Court held that the New York Stock Exchange exceeded its authority under the Securities Exchange Act in failing to give the plaintiff securities dealers notice and opportunity for hearing before denying them access to private wire connections. 373 U.S. at 365, 83 S.Ct. at 1261. The Court stressed the Congressional purpose of effecting a scheme of self-regulation designed to ensure fair dealing, and this purpose could not permit self-regulative activity carried out in a fundamentally unfair manner. *Id.* at 364, 83 S.Ct. at 1260. *Silver* explicitly based this holding on the scope of the delegation of authority from Congress to the Exchange to engage in a system of self-regulation, and the decision does not rely on a constitutional basis. The Court does, however, explain in a footnote that the basic nature of the notice and hearing rights required of the Exchange is similar to the requirement that "public agencies, labor unions, clubs, and other associations have, under various legal principles, all been required to afford notice, a hearing, and an opportunity to answer charges to one who is about

to be denied a valuable right." *Id.* at 367, n. 17, 83 S.Ct. at 1262 n. 17. This vague generalization provides little support for Benson's attack on the constitutionality of § 9(a) under the circumstances of the present case.

[930]Moreover, Benson has failed to cite any authority, nor is the Court aware of any, that has addressed a parallel scenario and held that the duty of fair representation applies, that the union's actions adequately satisfied the duty, and yet the union's actions nevertheless violated the constitutional rights of a member of its bargaining unit. Benson correctly argues "where exclusive representation is *not* subject to the statutory limitations of the [duty of fair representation], the courts must decide 'the constitutional questions.'" (*Id.*) It is, however, precisely because the union's actions are subject to such statutory limitations that the constitutional questions do not arise. Benson's constitutional arguments are therefore simply inapposite, attempting to force a constitutional analysis onto a situation that a long line of precedent prescribes a statutorily derived standard alleviating the constitutional concerns. If Benson is entitled to any relief under these circumstances, the source of that relief must be the requirements of CWA's duty of fair representation.

The heart of Benson's argument is that, under these circumstances, he is constitutionally entitled to represent himself, independently from his bargaining unit and contrary to the collective bargaining scheme established by Congress in enacting the federal labor laws. It is well settled, however, that the union's duty of fair representation, prohibiting it from acting arbitrarily, discriminatorily, or in bad faith toward any member, adequately protects the individual's interests. *Vaca*, 386 U.S. at 182, 87 S.Ct. at 912-13.

Accordingly, it is recommended that Benson's Motion for Summary Judgment as to the Second Claim be DENIED, and that CWA's Motion for Summary Judgment as to Benson's Second Claim be GRANTED.

Recommendation

For the foregoing reasons, it is recommended that the defendant Communications Workers of America's motion for summary judgment be GRANTED as to all Claims and that plaintiff James Benson's motion for summary judgment be DENIED. Judgment should be entered in favor of the defendants.

DIRECTIONS FOR MAILING AND REVIEW PROCEDURES

The Clerk shall mail copies of this Report and Recommendation to counsel of record. By copy of this Report and Recommendation, the parties are notified that pursuant to 28 U.S.C. § 636(b)(1)(C) and Fed.R.Civ.P. 72(b):

1. Any party may serve upon the other party and file with the Clerk written objections to the foregoing recommendation within ten (10) days from the date of mailing of this report to the objecting party (*see* 28 U.S.C. § 636(b)(1)(C) and Federal Rule of Civil Procedure 72(b)), computed pursuant to Rule 6(a) of the Federal Rules of Civil Procedure, plus three (3) days permitted by Rule 6(e) of said rules.

2. A district judge shall make a *de novo* determination of those portions of this report or specific recommendation to which objection is made.

The parties are further notified that failure to file timely objections to the recommendation set forth above will result in waiver of right to appeal from a judgement of this court based on such recommendation. *Thomas v. Arn*, 474 U.S. 140, 106 S.Ct. 466, 88 L.Ed.2d 435 (1985); *Wright v. Collins*, 766 F.2d 841, 846 (4th Cir.1985) (quoting *Carr v. Hutto*, 737 F.2d 433, 434 (4th Cir.1984), *cert. denied*, 474 U.S. 1019, 106 S.Ct. 567, 88 L.Ed.2d 552 (1985)); *United States v. Schronce*, 727 F.2d 91 (4th Cir.), *cert. denied*, 467 U.S. 1208, 104 S.Ct. 2395, 81 L.Ed.2d 352 (1984).

June 24, 1994

APPENDIX C

DECISION AND AWARD OF

NORMAN R. HARLAN, ARBITRATOR

March 20, 1993

IN THE MATTER OF ARBITRATION

Before

Norman R. Harkin, Arbitrator

§§§

THE GRIEVANCE (Quoted as Written)

"Barbara was denied her job application. The person chosen has less seniority and less Contel schooling.

Barbara should be given the job she applied for."

April 26, 1990

[2]Applicable Contractual Provisions

AGREEMENT

between

COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO

and

CONTEL OF VIRGINIA

Effective February 1, 1990 through January 31, 1993

ARTICLE 1 - Recognition

ARTICLE 2 - General Principles - Company/Union Relationship

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ARTICLE 15 - Grievance

ARTICLE 16 - Arbitration

Section 16-4 - Power of the Arbitrator

"The Arbitrator shall have no power to add to, take from, or modify the terms of this Agreement. The Arbitrator shall base his award upon the rights and benefits expressly conferred by this Agreement, and while he may consider explanatory evidence advanced by the parties (including negotiating history and expressed intent) in interpreting and applying the terms of this Agreement, he shall not, by implication, confer a right or benefit upon an employee, or abridge or curtail any right of management....."

ARTICLE 17 - Management Rights

Section 17-1 - "The Company retains the exclusive rights, functions and powers vested in it as owner and operator of its properties and business, including but not limited to:

a. The management of its operations and all its departments."

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f. "The right to determine the competency and qualifications of its employees."

[3]---

i. "The right to promote, retire, transfer, layoff or recall employees."

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o. "To otherwise generally manage its operation and all that inherent and common law management functions and prerogatives."

ARTICLE 18 - Seniority

Section 18-1 - "Seniority will be the determining factor, service needs permitting, in matters relating to choice of hours of work and in selecting employees for transfers.

Section 18-2 - In selecting employees covered by this Agreement for assignments to higher rated non-management classification, the best qualified senior applicant will be considered to fill the particular vacancy. Any grievance or arbitration determination regarding the application of this section shall not result in an award of back pay greater than sixty (60) working days."

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ARTICLE 23 - Job Advertisement

Section 23-1. "When a job vacancy exists, equal opportunity for all employees will be provided.

Section 23-2. When a vacancy has been established, lateral transfers will be considered first....."

Section 23-3. ——

Section 23-4. ""Applications will be checked by a Human Resources Representative who will note such information as hire date, time in present position, and the apparent qualifications of each applicant before submitting the applications to the requesting supervisor. This should be completed within three (3) days following the deadline for applying.

Section 23-5. After receiving the applications, the requesting supervisor will arrange with the supervisors of the applying employees to interview the qualified applicants. It is very

important that careful thought and consideration be given in selecting the employee filling the vacancy as the job from which the employee is transferred will not be held open.

[4]Section 23-6. "When the supervisor and a Human Resources Representative have selected the best qualified senior applicant, no further interviews will be conducted." (Underlining emphasis added in all instances of underlining)

THE ISSUE
(As framed by the Union)

"Did the Company violate the agreement dated February 1, 1990 when it assigned James T. Benson to the service technician classification. If so, what shall the remedy be?" (Union Brief, p. 2)

THE ISSUE
(As framed by Management)

"Did the Company violate the Contract by failing to select Barbara Kirker for the position of service technician-inspector in 1990?" (Company Brief, p. 1, quoting from the Transcript, p. 24)

THE ISSUE

Did the Employer violate the Wage Agreement by disqualifying Barbara Kirker for the position of Service Technician?

BACKGROUND

Contel of Virginia Incorporated, d/b/a GTE Virginia and the Communications Workers of America are Parties to a collective bargaining agreement. At the local level the bargaining unit employees are represented by Local No. 2276.

Barbara Kirker (Parrish) was employed by the Company on January 3, 1984. (Hereafter she will be referred to as Barbara Kirker, Ms. Kirker, or the Grievant). She has held the classi-[5]fications of Maintenance Technician, Dispatcher, Repair Clerk, Customer Service Representative, and Facilities Technician. On January 18, 1990, GTE posted a job for a Service Technician. Barbara Kirker and three other employees bid for the job. She was not selected. James (Jim) Benson, who is junior to her, was selected. On April 26, 1990 the instant Grievance was filed. The Parties met at the specified Steps contained in Article 15 of the Contract and disagreed at all Steps. The Union referred the Matter to arbitration.

Under the procedures specified in Article 16 of the Agreement the Undersigned was selected as the impartial Arbitrator. The

Hearing was held December 2, 1992 at the Holiday Inn, Virginia Beach, Virginia. The Parties were afforded full and fair opportunity for the examination and cross examination of Witnesses; the introduction of Exhibits and Authority; and oral argument. They agreed the Case was properly before the Arbitrator for disposition according to the terms and conditions of the Agreement between the Parties. Management and the Union decided to file Post Hearing Briefs and agreed they would be postmarked no later than February 12, 1993. The Briefs were timely filed.

POSITION OF THE PARTIES

UNION

1. The Company is in violation of the Agreement.

2. On January 18, 1990 a job was posted for a Service Technician.

3. Many employees bid for the job; Barbara Kirker, James Benson, Rich Noble and Joe Watson were the only applicants who were interviewed.

[6]4. James Benson was selected for the Service Technician. It is not in dispute that he is junior to Ms. Kirker.

5. Article 23 contains the Job Advertisement language. Section 18 is the seniority provision. Both contain language stating the "best qualified senior applicant will be considered to fill the vacancy."

6. The Company claims it can select the best qualified person, irrespective of seniority. However, this interpretation by Management has been rejected by an arbitrator in a prior award.

7. Richard Noble was ineligible to bid since he was seeking a downgrade from a job which paid more money. The application of seniority in bidding is applicable only if an employee is bidding to a higher-rated job.

8. The fact that one of the other bidders senior to James Benson chose not to file a grievance is irrelevant.

9. The Company has not contested that Barbara Kirker is qualified.

10. In view of Barbara Kirker's qualifications and seniority she is entitled to the Service Technician job.

EMPLOYER

1. There is no violation of the Agreement.

2. Under the Management Rights clause the Company retains broad rights related to managing its facilities and directing the workforce, to include determining qualifications.

3. In January, 1990 a job was posted for the position of Service Technician-Inspector. Numerous employees applied and the list was narrowed to four candidates.

4. An evaluation committee comprised of four representatives of Management reviewed the applications. Initially three committee members ranked Jim Benson first. After an in-depth discussion the committee unanimously selected Mr. Benson.

5. Mr. Benson's twenty years of experience in construction and his supervisory experience were considered significant

since the job would require primarily the monitoring of construction.

[7]6. Seven primary qualifications were listed on the NOTICE OF JOB POSTING. In addition, four qualifications "CONSIDERED A PLUS" were stated.

7. Barbara Kirker has the minimum qualifications for the job. However, Article 23 states that the "best qualified senior applicant" will be selected.

8. If applicants for a job are of equal ability or nearly equal ability Management selects the senior employee. This is an established practice and custom of at least seven years duration.

9. Ms. Kirker had limited experience in construction. Further, she had a couple of accidents and she missed six days of work the past year.

10. Historically the Union has tried to obtain Contract language by which seniority would govern for posted jobs. It has been unsuccessful.

11. It is clear that the language in Articles 18 and 23 noting "best qualified senior applicant" cannot be construed to be a "strict seniority clause."

12. "The seniority provisions in the Agreement seem to be the 'hybrid' type. The phrase in the Agreement, 'best qualified senior applicant,' indicates that both qualifications and seniority are to be considered....." (Co. Brief, p. 9)

13. The Company prevailed in the Ables Award (U-Ex. 1). Comments made by Mr. Ables which he was not required to address are merely obiter dictum.

14. The Union is attempting to obtain through arbitration something it was unable to obtain through negotiation.

15. There is no evidence the Company was arbitrary, capricious or discriminatory in its selecting Jim Benson for the Service Technician-Inspector job. There is no evidence the Company violated the Contract and the Grievance should be denied.

DISCUSSION

Much of the argument and testimony centered on the meaning of "best senior qualified applicant." The discussion developed into determining what type of clause Article 23 Section 6 is. [8]i.e., strict seniority, sufficient ability, relative ability or hybrid.

In its Brief the Employer cites extensively from How Arbitration Works.[1] Seniority provisions are generally divided into two types, "strict seniority," 'in which the most senior person gets preference without regard to any other considerations; and "modified seniority," the most usual provision, in which the qualifications of the employee are taken into account." (Co. Brief, p. 8) The Company continues.

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[1]Elkouri & Elkouri, How Arbitration Works, BNA, Wash. DC, 4th ed.

(1) "Relative Ability" clauses, are those in which the senior employee is given preference if he possesses fitness and ability equal to that of junior employees. Depending on the wording of individual clauses, the term 'equal' could be replaced by 'relatively equal' or 'substantially equal.' (Co. Brief, pp. 8-9, quoting Elkouri & Elkouri, p. 611).

(2) "Sufficient Ability" clauses give preference to the senior employee if he or she can do the job. Comparisons between the applicants are unnecessary and the job must be given to the senior person if he is competent, regardless of how much more competent another bidder may be. This is clearly not the type of clause present in the Agreement because under Section 23-5, interviews of the qualified applicants are to be conducted. Under a 'sufficient ability' clause, there would be no need for an interview once a candidate was deemed "qualified." Co. Brief, p. 9.

(3) "Hybrid" clauses require consideration and comparison of both seniority and relative ability. The hybrid clause is usually worded in such a way that there is no indication of the relative weight to be accorded seniority vs. relative ability." Co. Brief, p. 9, quoting Ibid, p. 612.

"The seniority provisions in the Agreement seem to be of the "hybrid" type. The phrase in the Agreement, 'best qualified senior applicant,' indicates that both qualifications and seniority [9]are to be considered, but it offers no indication of the relative weight to be accorded each factor. The Company and the Union seem to be in general agreement that the seniority clause contained in the Agreement is a hybrid clause. Counsel for the Union referred to the seniority clause as a hybrid clause in his opening argument

(Tr.18). Assuming that the Agreement contains a 'hybrid' type of seniority clause, the next task is to determine how much weight should be given to qualifications as compared to seniority.

Elkouri and Elkouri suggest that hybrid clauses require a balancing of both seniority and qualifications in about equal proportions. (Elkouri & Elkouri at 613)

> 'It seems clear that under "hybrid" clauses the relative claims of seniority and of ability must be determined by comparing and weighing against each other the relative difference in seniority of competing employees and the relative difference in their abilities. Thus, in comparing two or more qualified employees, both seniority and ability must be considered, and where the difference in length of service is relatively insignificant and there is a relatively significant difference in ability, then the ability factor should be given greater weight; where there is a relatively substantial difference in seniority and relatively little difference in abilities, then length of service should be given greater weight.' (pp. 9-10, Co. Brief)

In its Brief the Union argued that the language found in Article 23, Section 6; "best qualified senior applicant," constitutes a sufficient ability clause. In developing this premise, it analyzed in

detail the Ables Award.[2] (Union Ex. 1) We will be discussing Ables here and in the OPINION SECTION of this Award.

The 1984 Agreement, Article 19, Section 2, stated:

> [10]"In selecting employees covered by this Agreement for assignments to higher rated non management classifications, seniority will govern among the group of qualified employees to be considered to fill the particular vacancy ...." (Co. Ex. 7C)

Article 24, Section 6 of the 1984 Agreement stated:

> "When the supervisor has selected the best qualified senior applicant, no further interviews will be conducted and the supervisor will notify the Personnel Representative of his choice." (Co. Ex. 7C)

Arbitrator Ables concluded Article 19, Section 2 of the 1984 Agreement constituted a sufficient ability clause and we agree with this conclusion.

Article 19, Section 2 of the 1984 Agreement became Article 18 Section 2 of the 1987 Agreement. It underwent a change as shown below.

> "In selecting employees covered by this Agreement for assignments to higher rated non-management classifications, the best qualified senior applicant will be considered to fill the particular vacancy. Any grievance or arbitration determination

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[2]Continental Telephone Company of Virginia & Communications Workers of America, AFL-CIO, Local No. 2275, Robert J. Ables, Oct. 30, 1990.

regarding the application of this section shall not result in an award of back pay greater than sixty (60) working days.) Co. Ex. 7D)

Article 23, Section 6 remained the same.

In the 1990 Agreement, which is controlling here, Section 18-2 is unchanged. Likewise Section 6 of Article 23 remained intact.

Our first task is to determine the meaning of Article 18-2; i.e., what type of clause is it? Clearly it is not a strict seniority clause under which the senior bidder would be awarded the vacancy irrespective of qualifications or even if he/she had no qualifications. Linwood Grimes, President, CWA Local No. 2275, testified he believed the clause was a strict seniority clause and the senior [11]applicant would have to be selected even if not qualified (Tr., p. 136). We do not agree with Mr. Grimes' interpretation. Further, the Union did not propose such an interpretation, recognizing that the successful applicant had to possess at least the minimum qualifications.

Is it a sufficient ability clause? Arbitrator Ables determined that the language of Article 19, Section 2 of the 1984 Agreement constituted a sufficient ability clause and we agree as previously stated. In addressing the change in the 1987 Contract Mr. Ables

noted; ".....[T]he parties adopted a much less precise standard for promotion than existed under the previous [1984] contract." Ables, at p. 7. He adds:

> "There is no evidence the parties bargained for the phrase to have substantive effect but the change had that effect." at p. 8, underling [sic] added.
>
> "The Contract in issue mixes standards." p. 8.
>
> "Among other things the new language does not do is to give the employer rights to judge competing applicants on the basis of their relative qualifications, as the employer now professes...." p. 9.
>
> "It remains true, however, under changed contract standards, that an applicant--any applicant--for promotion must be qualified for the job, before seniority is included in the menu." at p. 9

It seems apparent that Mr. Ables determined that "best qualified senior applicant" language did not result in a relative ability clause while at the same time concluding that the language did place more emphasis upon qualifications. Considering his stating that the "new phrase" had "substantive effect" one is led to the conclusion that he ruled out all types except "hybrid," noting:

> ".....[W]hatever priority was intended for the senior employee, he must now be 'best senior qualified applicant." at p. 9.

[12]Sufficient ability clauses this Arbitrator has seen usually state words to the effect; "The senior qualified bidder (or applicant) will be awarded the vacancy."

The language found in relative seniority clauses may vary but it is the Arbitrator's experience that they make it clear that qualifications have priority, such as in the following: "The best qualified applicant (or bidder) will be awarded the job." Arbitrator Ables found the "best qualified senior applicant" cannot be construed to be a relative seniority clause and we agree. This leads us to conclude it is a hybrid clause which requires weight be given to both ability and seniority, although the language leaves the clause open to interpretation concerning how much weight should be given to each. The Company argues strongly that the clause or phrase in question is a hybrid clause. The Union seemed at times to be leaning in that direction (Tr., p. 18) but presented a lengthly argument for the proposition that it is a sufficient ability clause (U-Brief, pp. 14-18).

The Union also argues that the Ables Award establishes arbitral res judicata and as such this Arbitrator is obligated to

sustain the grievance on that basis. This will be addressed in the Opinion Section of the Award.

OPINION

Based upon the evidence there is no question that the job of Service Technician would be awarded to Barbara Kirker if Article 23, Section 6 was a sufficient ability clause. We have [13]determined it is not a sufficient ability clause and the reasons have been stated for reaching this conclusion. What must be determined now is whether the Grievant meets the standards established by the "best qualified senior applicant" language of Articles 18-2 and 23-6.

The Employer submits it has a practice of awarding such a vacancy to the applicant who is best qualified if he/she is sigfinicantly more qualified.

> "The Company has had a number of cases in which, consistent with its policy, a less senior applicant has been selected on the basis of superior qualifications. In Requisition No. 1694, Milton Warren was selected for a communications technician position over Ramon Thompson, even though Mr. Thompson had six years more seniority. In Requisition No. 1691, Two less senior applicants, Charles Faulkenberry and Gino Cianelli, were promoted over Ramon Thompson and Eugene Kirk, both of whom had more seniority. (Tr. 108-109) (Co. Brief, pp. 7-8)

The Union disagrees that there is an established practice and custom of awarding vacancies to employees with superior qualifications.

> "Moreover, the two cases cited by the Company certainly do not constitute a binding practice which would serve to alter the terms of the parties' agreement. It is well settled that 'to be given significant weight in contract interpretation, the practice must be of sufficient generality and duration to imply acceptance of it as an authentic construction of the contract.' Elkouri at p. 453....These two incidents hardly amount to a 'general practice of long duration." (U-Brief, pp. 21-22.

> "In addition, to be accepted as binding, a practice must show evidence of mutuality.....Elkouri at p. 452. 'Unilateral interpretations' of the contract by one party do not bind the other party.....In the present case....the record is clear that the union not [14]only grieved, but in fact arbitrated the Company's promotion of junior employees over senior employees pursuant to its supposed policy of comparing relative qualifications (UX-8). And the Union was successful in having the arbitrator uphold the Union's interpretation of the proper standard for awarding promotions under the contract. Moreover the Company presented no evidence that, except for Ms. Kirker, any senior employee was bypassed for promotion since the rendering of the Ables Award. Under these circumstances, then, the Company has utterly failed to establish a practice of sufficient frequency, duration, or mutuality under the parties' contract...." (U-Brief, p. 22)

Both Parties cite Elkouri & Elkouri, who devote a full Chapter to the subject of "Custom and Past Practice," pp. 437-456. To summarize the subject we cite another authority.

> "'Past practice' relates to a much-repeated course of conduct regularly engaged in over a very substantial period of time by parties who can reasonably be presumed to be aware of such conduct. This may refer to innumerable courses of action by either the union or the employer or both. Hence, proof of a pattern of conduct that has existed over an extended period should be admitted. A few casual incidents do not establish a true 'past practice.' Proper proof of long-standing repetition with full knowledge on both sides justifies a conclusion that the practice should not be changed without mutual agreement, unless it is of such nature that in the normal course of industrial relations it is regarded as a matter that lies entirely within the rights and discretion of one party. Proof in this area is important since a clearly established 'past practice' should be sustained just as if it were written in the the contract." Arbitration and Labor Relations, Clarence M. Updegraff, BNA, Wash. D.C., 3rd ed., p. 230

It is commonly held that the Party asserting the existence of a practice and custom bears the burden of proof. It is abundantly clear that GTE has failed to carry this burden by meeting any of the tests noted above.

[15]We take notice that a few senior employees who were bypassed in favor of junior employees did not grieve. Howev-

er, the collective bargaining agreement in force was not negotiated by these individuals or any other individuals; it was negotiated between General Telephone and the Communications Workers. We are aware that there are instances in which arbitrators have ruled that the failure of the Union to assert a right which transcends collective bargaining agreements constitutes a waiver of such rights; there is no evidence here that this occurred. Ables is a case-in-point. As in practice and custom assertions, in situations where one Party contends the other has been "sitting on its rights," the moving Party bears the burden of proof. Management has failed to carry this burden.

There were several candidates for the Service Technician job; the record does not state specifically how many. The Employer dedermined only four were qualified; Jim Benson, Barbara Kirker, Rich Noble and Joe Watson. The evidence shows Mr. Noble was classified as a Communications Technician, which has a higher wage rate than the Service Technician (Jt. Ex., 1, pp. 49-50). The CWA noted this and argued Mr. Noble could not be considered for the Service Technician job

since Article 18-2 specifically provides "for assignments to higher rated non-management classifications..." We do not wish to be abrupt, but clearly Mr. Noble was not eligible to bid and should not have been considered. As such, we see no need to further discuss Mr. Noble.

In view of its importance the NOTICE OF JOB OPENING is reproduced below.

[16](COMPANY EXHIBIT - 1)

NOTICE OF JOB OPENING

The Company wishes to notify all employees there is an opening for: SERVICE TECHNICIAN
in the NETWORK DESIGN Area/Division
located at VIRGINIA BEACH

If you feel you meet the qualifications for this position and are interested in being transferred, please forward your "Application for Job Posted" to the Human Resource Representative by JANUARY 29, 1990.

QUALIFICATIONS

1. Experience in climbing.
2. Legible handwriting and not color blind.
3. Be able to work shifts, overtime, weekends, holidays and call-outs.
4. Have good attendance, safety, and health records.
5. Have valid Virginia operator's license and good driving record.

6. Be willing and available to attend and successfully complete any required schools.
7. Must have good communication skills.

ADDITIONAL QUALIFICATIONS WILL BE CONSIDERED A PLUS:

1. Previous experience splicing, key system, and telephone installation and repair.
2. Understand construction and engineering drawings.
3. Be able to locate existing cable facilities and perform D.C. testing.
4. Knowledge of cable throws including throw sheets and cable assignments.
5. Knowledge of "Miss Utility" program, permits and right-of-way.

Applicants meeting all of the above qualifications will be considered before applicants that do not meet all of the qualifications. The company's business needs will determine selection of lesser qualified applicants.

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Article 23-4 speaks of "the apparent qualifications of each applicant." The Union discusses this in its Brief. Once the Human Resource Department determines the applicants who are "apparently qualified" it refers their credentials to the supervisors who make arrangements to interview the "qualified applicants." This is the process by which Kirker, Benson and

Watson came to be interviewed; all were considered qualified applicants.

Both Management and the Union went into considerable detail in their Briefs discussing qualifications. We will try to summarize the qualifications of Barbara Kirker without diluting them. Before proceeding, we note GTE mentioned that she had a vehicle accident and missed six (6) days work in 1989 compared to no accidents and perfect attendance for Jim Benson during the same period. (Management also referred to a tripping incident involving Ms. Kirker since the Grievance was filed). We do not consider these latent arguments to render Ms. Kirker unqualified nor do they significantly affect her overall qualifications. If they were, in fact, reasons which were to be afforded significant consideration, we have to believe Management would have applied such weight and would not have considered Ms. Kirker qualified. We are not suggesting safety and attendance are not important; indeed they are. But one minor accident is not damning and six days of absence in one year hardly suggests chronic absenteeism. We add the six days are due to illness.

Union Ex. 5 shows a comparison of Management's evaluation of Barbara Kirker (Candidate A) and Jim Benson (Candidate B). It was supplied to the Union by the Company. Five (5) is the high-[18]est rating. While the weight afforded each rating is not in the record, both Barbara Kirker and Jim Benson received a total of twenty six (26) points by Management's evaluation. Mr. Benson received five for attendance: Ms. Kirker received two. Ms. Kirker rated higher in "Quality of Work," Judgement (sic), and "Work Relationships." The back-up document for UX-5, the PERFORMANCE EVALUATION (UX-7), contains statements of praise for Ms. Kirker (as noted in the Union's Brief). The evidence shows Ms. kirker's Contel training greatly exceeds that of Mr. Benson. Mr. Benson has a 2-year degree in Business Administration. Barbara Kirker is working toward an A.S. Degree in Electronics. Both are apparently highly motivated, but it seems apparent an A.S. Degree in Electronics would be of more technical assistance in the Service Technician job than would a degree in Business Asministration while the Business Degree would supply more general knowledge about "business."

We should discuss the "ADDITIONAL QUALIFICATIONS" stated on the "NOTICE." The evidence is persuasive that the Grievant met all of the "ADDITIONAL QUALIFICATIONS." Testimony of Company Witnesses concentrated upon the overall experience of Mr. Benson, particularly his experience monitoring or supervising contractors. However, the evidence shows if a Service Technician would have made a lateral move, such experience would not have been a consideration (Tr. p. 62). Further, unrefuted testimony also shows employees currently classified as Service Technician do not have the overall experience of Mr. Benson. (Tr. pp. 133-134).

We do not question the testimony of Management Witnesses who stated essentially that Mr. Benson "interviewed" better than Ms. [19]Kirker, particularly on questions related to supervising personnel (Co. Ex. 3). Neither do we question Management's right (as stated in its Brief, pp. 10-12) to use a variety of methods to determine qualifications. Over the years this Arbitrator has heard many job bidding cases and in fact heard one last week. It is fundamental that in determining who is selected, Management is limited in its inquiry to the qualifi-

cations stated on the job posting. It is also basic that the qualifications for any given job reflect what is required for that particular job. We recognize this sounds redundant and we will attempt to explain in an oversimplified way. Let's assume an employer posted a job which required only a chauffeur's license but in interviewing applicants it found one applicant had a CDL (Commercial Driver's License) and awarded the job to that applicant on the basis he was "best qualified." Obviously it would be adding a requirement not stated on the posting. In our Case Management admittedly gave considerable weight to Jim Benson's supervisory experience and his experience in construction even though neither was listed on the Posting as being either a primary or a secondary requirement. Further, the evidence shows neither has been a historic requirement for the Service Technician job. One can only conclude Management did not deem them relevant in the past. The NOTICE only required an understanding of "construction and engineering drawings. Ms. Kirker stated in her application; "I have a good understanding of construction and engineering drawings." This was not refuted.

[20]CONCLUSIONS

A. Res Judicata

In its Brief the Union expands its res judicata argument which it mentioned during the Hearing.

> "The Ables award serves as 'authorative' or 'persuasive' precedent in the present case, and as such it should be followed by this Arbitrator....[A]rbitrators have recognized the desirability of consistency in contract interpretation through deferral to prior awards on the same contractual issue. (Underlining added) p. 16.

> "Where a new incident gives rise to the same issue that is covered by a prior award, the new incident may be taken to arbitration but it may be controlled by the prior award. The destiny of a party's claim thus may be governed by a prior award which either precludes the claim under res judicata concepts or controls the decision on the claim by stare decisis concepts. In some instances arbitrators likewise have made the prior award the governing factor by application of a third judicial concept, collateral estoppel, which stands somewhere between the concepts of res judicata and stare decisis....However, regardless of whether the arbitrator speaks in terms of res judicata, collateral estoppel, or stare decisis, ordinarily the prior award by some procedure will have been the governing factor in the disposition of the present claim. U-brief, pp. 16-17, quoting How Arbitration Works, Ibid, p. 422.

"The Elkouris went on to note that arbitrators have found

> that a proper regard for the arbitration process and for stability in collective bargaining relations requires acceptance by an arbitrator, even though he is not technically bound, of any interpretation of the parties' contractual relations rnedered by a previous arbitrator, if in point and if based on the same agreement. U-Brief, p. 17, underlining added. Ibid, p. 426.

[21] "The idea that arbitrators generally apply prior awards on the same subject is also rooted in the notion that the prior award 'usually becomes a binding part of the agreement and will be applied by arbitrators thereafter." Ibid, p. 425...."The Elkouris quote approvingly in this regard from the opinion of Arbitrator Whitley P. McCoy in Pan Am. Ref. Corp., 2ALAA ¶67, 937, p. 69, 464 (1948). In Pan Am, Arbitrator McCoy stated that where a

> prior decision involves the interpretation of the identical contract provision, between the same company and union, every principle of common sense, policy, and labor relations demands that it will stand until the parties annul it by a newly worded contract provision. U-Brief, p. 17.

"...In the instant case, all of the elements militatating in favor of deferral to the prior award identified by Arbitrator McCoy are present. The Kirker grievance involves the interpretation of the 'identical contract provision,' 18-2, as Arbitrator Ables interpreted in the Trelawny and Fries grievance. The language of that section in the current agreement is identical of the language in §18-2 in the 1987 agreement interpreted by ...Ables. The Parties are also identical. Thus, the Ables award should be applied." U-Brief, pp. 17-18.

It is commonly held that for res judicata to apply the prior grievance and the instant grievance must involve the following:

1. The same issue;
2. Between the same parties;
3. At the same location;
4. The same contractual provision and
5. Identical or similar facts.

In Ables GTE disqualified two senior applicants because they did not meet the basic job requirements; namely attendance. Mr. Ables agreed they were not qualified. Here Ms. Kirker met all the basic qualifications as well as the ancillary requirements. Thus Mr. Ables did not have to determine if Grievants Fries and Trelawny were the "best qualified senior applicants;" he merely determined they were not qualified. Clearly, Ables and the instant Case deal with different issues and res judicata is not applicable. This is not a narrow application of res judicata; this is simply "How Res Jucicata Works."

[22]B. The Merits

In discussing what "best qualified senior applicant" means, Mr. Ables stated; "At best, the phrase is muddy." He noted the language "mixes standards." (p. 9). We have attempted to clarify the "mud" by carefully analyzing the evidence. Mr. Ables attached some significance to the fact that Management proposed the change which resulted in the "best qualified senior applicant" addition to

Article 18-2. Based upon primarily the testimony of Mr. Hall he determined it was a cosmetic change made to reflect the same language which was in Article 23-6. On the other hand, Mr. Ables stated; "There is no evidence the parties bargained for the new phrase to have substantive effect but the change had that effect." Management believes Article 18-2 now places more weight upon qualifications than on seniority. The Union believes it means if the senior applicant is qualified he/she gets the job irrespective of the qualifications of another applicant. Arbitrator Ables rules it is not a relative ability clause and we agree. Further, Management did not contend this, although its definition of a hybrid clause leans in that direction.

We believe the ambiguity and the fact we have never seen such language in over twenty years of experience reading labor agreements makes this some type of hybrid clause. It seems apparent neither Party took cognizance of the long-run impact of the change. The record suggests Management and the Communications Workers accepted it was an upgrade from the prior sufficient ability language, but left the definitive nature of the phrase up in the air.

[23]Based upon the ambiguity of the "best qualified senior applicant" language and conflicting evidence we cannot quantify precisely the weight to be afforded to qualifications and seniority. However, the record does supply sufficient evidence to resolve the instant issue. Management stated in argument and through testimony it interprets Article 18, §2 to mean the senior qualified applicant gets the job if he/she is as well qualified or nearly as qualified as other applicants. The evidence is clear and convincing Barbara Kirker

1. Meets all the primary qualifications of the job;
2. Meets the requirements of the "Additional Qualifications; and
3. Is as qualified or nearly as qualified as James Benson.

There is no question that Management is vested with the authority to establish job related qualifications for all classifications; this is not at issue. It does not have the right to arbitrarily alter the posted job requirements by developing an interview questionnaire which deviates from the posted job requirements. Further, it is apparent from the testimony of Management Witnesses that the supervisory/general administrative experience gained by Mr. Benson with other Employers was a major factor in his being rated the

highest, in spite of the fact these are not mentioned on the job posting. It is axiomatic that an abritrator should not substitute his judgment for that of Management absent a violation of the Contract or if Management has not acted in an arbitrary, capricious, or discriminatory manner. As noted, the language of Article 18, §2 is open to interpretation and reasonable people may differ on its meaning. However, the Em-[24]ployer failed to comply with its own posting and its own interpretation of 18-2 view and giving controlling weight to those requirements. We wish to make it clear we are not determining "best senior qualified applicant" means seniority plays a role only if an applicant is as qualified or nearly as qualified as another applicant. The evidence does not supply a clear answer. We are merely applying Management's interpretation here because it establishes an evidentiary basis upon which the instant Matter can properly be resolved.

By Management's own standards Barbara Kirker met the job qualifications as posted - and not by minimal standards. Based upon the evidence and the applicable Contractual language the Service Technician vacancy should have been awarded to her.

AWARD

The Grievance is sustained. Backpay is awarded based upon Article 18, Section 2 which limits backpay to sixty (60) working days.

/s/
Norman R. Harlan, Arbitrator

Montgomery, West Virginia

March 20, 1993

APPENDIX D

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution

First Amendment. Congress shall make no law * * * abridging the freedom of speech * * * ; or the right of the people peaceably to assemble * * * .

Fifth Amendment. No person * * * shall be deprived of life, liberty, or propery, without due process of law * * * .

National Labor Relations Act § 9(a), 29 U.S.C. § 159(a)

(a) Exclusive representatives; employees' adjustment of grievances directly with employer

Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment * * * .

APPENDIX E

AMENDED COMPLAINT

February 15, 1994

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA,
NORFOLK DIVISION

JAMES T. BENSON,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 2:93CV552
	)	
COMMUNICATIONS WORKERS OF AMERICA	)	
	)	
and	)	
	)	
CONTEL OF VIRGINIA, INC.	)	
	)	
Defendants.	)	

AMENDED COMPLAINT*

Plaintiff James Benson, by and through counsel, for his claims for relief against defendant Communications Workers of America states as follows:

---

* Material added to the original Complaint is shown in double-underline typeface. Material stricken from the original Complaint is shown in ~~strikeout typeface~~.

Jurisdiction and Venue

1. This Court has jurisdiction under 28 U.S.C. §§ 1331 and 1337(a) in that the claims for relief concern the interpretation and application of § 9(a) of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 159(a), an Act of Congress regulating commerce, and the First and Fifth Amendments to the Constitution of the United States. Venue is proper under 28 U.S.C. § 1391. This Court also has jurisdiction, and venue is proper, under 29 U.S.C. § 185.

Parties

2. Plaintiff James Benson ("Benson") is a citizen of the United States and a resident of the Commonwealth of Virginia. He is an "employee" within § 2(3) of the NLRA, 29 U.S.C. § 152(3), and is employed as a facility technician by Contel of Virginia, Inc. ("Contel") d/b/a GTE Virginia ~~Incorporated~~, at its facility in Virginia Beach, Virginia.

3. Defendant Communication Workers of America ("CWA") is a labor organization under § 2(5) of the NLRA, 29 U.S.C. § 152(5). It is the "exclusive representative" of a bargaining unit of Contel's employees, under § 9(a) of the NLRA, 29 U.S.C. § 159(a), which includes Benson's positions as facility technician and service technician. As Benson's exclusive representative, CWA

exercises authority and conducts numerous activities in Virginia Beach, and other places within the Eastern District of Virginia, including representing and acting for employees such as Benson.

4. Defendant Contel is an "employer" within § 2(2) of the NLRA, 29 U.S.C. § 152(2), and the employer of Benson.

Operative Facts

5. In its capacity as Benson's § 9(a) exclusive representative, CWA has negotiated and enforced a collective bargaining agreement ("CBA") with Contel, which was effective from February 1, 1990 through January 31, 1993, concerning the wages, hours, and working conditions of Contel's bargaining unit employees, including Benson. The CBA contained provisions dealing with grievances and arbitration of grievances.

6. On or about January 18, 1990, Contel posted an opening for the position of service technician, a position under the CBA. Benson, at that time a facility technician, and other employees within the bargaining unit bid for the open position. From among them, Contel selected Benson. The change from a facility-technician to a service-technician position was a promotion for Benson, which resulted in increases in compensation and compensation-related benefits. Among other bidding employees who were not

selected for the service-technician position was Barbara Kirker ("Kirker"), a non-party to this civil action.

7. On or about April 26, 1990, CWA filed a grievance for Kirker under the CBA, challenging Contel's selection of Benson. That grievance was handled by CWA and Contel under the CBA, but was not resolved by them prior to arbitration. As a result, CWA filed for arbitration of the dispute. An arbitration hearing was held on December 2, 1992, before Norman R. Harlan ("Arbitrator"). The Arbitrator entered an award on March 20, 1993 ("Arbitration Award"), sustaining CWA's grievance and awarding Benson's service-technician position to Kirker.

8. Prior to and during the course of the grievance and arbitration, CWA failed to provide Benson with notice of either the grievance or the resulting arbitration-proceedings. CWA also failed to provide Benson with representation adequate to protect his employment-related interests under the CBA. And CWA further failed to give Benson an opportunity for a hearing on its proposed action in bringing the grievance, as to the grievance itself, or before the Arbitrator.

8A. The Arbitration Award was erroneous, in that it held that Kirker was as qualified or nearly as qualified as Benson for the posted Service Technician position, when in fact Kirker was not as

qualified or nearly as qualified as Benson. The Arbitrator arrived at this erroneous decision because he was not presented with crucial testimony from Benson concerning (but not limited to) his (Benson's) previous experience with another employer, which testimony could or would have established that Kirker was not as qualified or nearly as qualified as Benson for the posted service-technician position.

8B. CWA's failure to give Benson notice of and an opportunity to participate in the grievance and arbitration process affected the outcome of the Arbitration Award and contributed to the erroneous decision of the Arbitrator, with adverse consequences to Benson, in that, as a result of CWA's said failure, the Arbitrator was not presented with crucial testimony from Benson concerning (but not limited to) his (Benson's) previous experience with another employer, which testimony could or would have established that Kirker was not as qualified or nearly as qualified as Benson for the posted service-technician position.

9. The Arbitration Award effectively demoted Benson, resulting in decreases in his compensation and compensation-related benefits.

10. Both CWA and Contel are treating, and unless restrained by this Court, will continue to treat the Arbitration Award, and the resulting demotion of Benson, as valid under the CBA.

First Claim For Relief
(Duty of Fair Representation Violations)

11. Under color of § 9(a) of the NLRA, CWA was and is Benson's "exclusive representative" for dealing with Contel over Benson's wages, hours, and other terms and conditions of employment. In that capacity, CWA owed and owes Benson the fiduciary duty of fair representation ("DFR"). The DFR requires that CWA:

A. provide Benson with information in its possession which is of value to him in making decisions concerning his wages, hours, and working conditions with Contel;

B. fairly represent him in collective bargaining, contract administration, and grievance-handling with Contel as to Benson's wages, hours, working conditions, and other terms and conditions of employment; and

C. not contemplate or actually take action adverse to Benson's employment interests without providing him with (i) notice of that contemplated or actual adverse action and (ii) an opportunity to be heard as to such action, in time for him to protect his interests.

12. Despite and in derogation and violation of these DFR obligations, CWA:

A. did not provide Benson with information in its possession which was of value to him in making decisions concerning his wages, hours, working conditions, and other terms and conditions of employment with Contel, but withheld such information from him, including (but not limited to) CWA's decision to prosecute and reasons for prosecuting the grievance, the content of grievance-adjustment meetings between CWA and Contel, CWA's decision to seek arbitration, and the pendency of arbitration and CWA's position before the Arbitrator;

B. did not represent him in dealing with Contel to improve his wages, hours, working conditions, and other terms and conditions of employment, but failed to provide such representation ~~from~~ to him at all stages of the grievance and arbitration processes;

C. did not provide him with timely notice of its contemplated and actually adverse actions concerning his wages, hours, working conditions, and other terms and conditions of employment at any stage of the grievance and arbitration processes, but failed to provide notice to him at all times; and

D. did not provide him with an opportunity to be heard at any stage of the grievance and arbitration processes, but deprived him of such opportunity.

13. CWA's actions as described ante were arbitrary and without rational basis, were not in furtherance of the legitimate functions or in exercise of the legitimate discretion of an exclusive representative under § 9(a) of the NLRA, and constituted a per se violation of the DFR.

Second Claim For Relief
(Constitutional Violations)

14. CWA's authority as exclusive representative under § 9(a) of the NLRA divests Benson of his right to deal directly with Contel over his wages, hours, and other terms and conditions of employment, or to select agents other than CWA to do so. In the absence of § 9(a), CWA would lack authority to require Benson to accept it as his exclusive representative; Benson would not be required to associate with CWA as his collective-bargaining representative; and Benson would have full freedom of contract to deal directly, or through a representative of his own choosing, with Contel.

15. Consistent with the First Amendment and the Due Process Clause of the Fifth Amendment to the Constitution of the United States, CWA may not exercise the authority of an exclusive representative under color of § 9(a) of the NLRA:

A. to fail to provide Benson with information in its possession which is of value to him in making decisions concerning his

wages, hours, working conditions, and other terms and conditions of employment with Contel, and to withhold such information from him, including (but not limited to) CWA's decision to prosecute and reasons for prosecuting the grievance, the content of grievance-adjustment meetings between CWA and Contel, CWA's decision to seek arbitration, and the pendency of arbitration and CWA's position before the Arbitrator, as described ante;

B. to fail to represent Benson in dealing with Contel to improve his wages, hours, working conditions, and other terms and conditions of employment, and to withhold such representation from him at all stages of the grievance and arbitration processes, as described ante;

C. to fail to provide Benson with timely notice of its contemplated and actually adverse actions concerning his wages, hours, working conditions, and other terms and conditions of employment at any stage of the grievance and arbitration processes, and to withhold notice from him at all times, as described ante; and

D. to fail to provide Benson with an opportunity to be heard at any stage of the grievance and arbitration processes, and to deprive him of such opportunity, as described ante.

16. If CWA may exercise authority under § 9(a) of the NLRA adverse to Benson as described in paragraph 12.A. through 12.D.,

ante, then CWA's use of such authority abridges Benson's right to free association under the First Amendment, deprives him of due process of law under the Fifth Amendment, and is therefore unconstitutional as applied.

Third Claim for Relief
(Violation of Collective-Bargaining Agreement)

17. An implied condition of the grievance and arbitration provisions of the CBA is that CWA, in prosecuting a grievance and ensuing arbitration thereof, not violate its DFR to an employee (such as Benson) adversely affected by that grievance, or abridge his constitutional rights, by denying him notice of and an opportunity for hearing on its actions.

18. In prosecuting the grievance and arbitration thereto described ante, CWA violated its DFR to Benson, or abridged his constitutional rights, by denying him notice of and an opportunity for hearing on its actions, as alleged ante.

19. Under these circumstances, whatever the substantive merits of the said grievance were the grievance heard in a fair hearing at which Benson was allowed to testify and otherwise participate, the grievance, its referral to arbitration, and the Arbitration Award all violated the CBA. And Benson would prevail on the merits of the said grievance were the grievance heard in a fair hearing in any forum.

20. CWA's continued reliance on and enforcement of the Arbitration Award, to Benson's detriment, is a violation of the CBA.

21. Contel's continued reliance on and enforcement of the Arbitration Award, to Benson's detriment, is a violation of the CBA.

22. Absent an order from this Court, CWA will continue to rely on, and demand that Contel enforce, the Arbitration Award to Benson's detriment.

23. Absent an order from this Court, Contel will continue to enforce the Arbitration Award to Benson's detriment.

24. Benson has no adequate remedy at law for the violations of his rights alleged in paragraphs 1 through 23, ante.

Prayer for Relief

WHEREFORE, Benson prays that this Court grant the following relief:

I. A declaratory judgment, under 28 U.S.C. § 2201, that, through its acts and failures to act as set forth in the First and Second Claims For Relief, CWA

A. has violated its DFR; or, in the alternative,

B. has violated the First and Fifth Amendments to the United States Constitution under color of § 9(a) of the NLRA.

II. A declaratory judgment, under 28 U.S.C. § 2201, against CWA and Contel that the Arbitrator's Award was entered without notice to Benson and an opportunity for him to be heard, in violation of CWA's DFR or Benson's constitutional rights, and in violation of an implied term and condition of the CBA, and therefore is null and void and of no operation or effect as to him.

III. An injunction requiring CWA to:

A. cease and desist from invoking in any manner the authority of the Arbitration Award and from claiming any rights, powers, privileges, or immunities under color of that award for Kirker or any other employee in ~~derogatrion~~ derogation of Benson's rights;

B. take all actions necessary to vacate, nullify, withdraw, or otherwise render of no practical operation and effect the Arbitration Award, and to restore Benson to his service-technician position with full employment-benefits (including, but not limited to, seniority) accruing to him as if the Arbitration Award had never been issued;

C. cease and desist from violating its duty of fair representation in the ways alleged in the First Claim For Relief, or, in the alternative, from violating the First and Fifth Amendments in the ways alleged in the Second Claim For Relief; and

D. if it chooses to begin the grievance and arbitration processes again, to provide Benson with notice of its actions and an opportunity to be heard at each stage of those processes.

IV. An injunction requiring Contel to

A. cease and desist from invoking in any manner the authority of the Arbitration Award and from claiming any rights, powers, privileges, or immunities under color of that award for Kirker or any other employee in ~~derogatrion~~ derogation of Benson's rights;

B. take all actions necessary to vacate, nullify, withdraw, or otherwise render of no practical operation and effect the Arbitration Award, and to restore Benson to his service-technician position with full employment-benefits (including, but not limited to, seniority) accruing to him as if the Arbitration Award had never been issued.

~~IV.~~ V. An award against CWA of compensatory damages, including (but not limited to) lost earnings and the value of seniority and other compensation-related benefits of which Benson has been deprived as the result of CWA's actions and the Arbitration Award.

~~V.~~ VI. The costs of this action, and reasonable attorneys' fees if the Court finds such fees appropriate. And,

~~VI.~~ VII. Such other and further relief as the Court may deem just and proper in the premises.

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Attorneys for Plaintiff

APPENDIX F

DECLARATION OF JAMES T. BENSON

January 7, 1994

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

JAMES T. BENSON,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 2:93cv552
	)	
COMMUNICATIONS WORKERS OF AMERICA,	)	
	)	
and	)	
	)	
CONTEL OF VIRGINIA,	)	
	)	
Defendants.	)	

DECLARATION OF JAMES T. BENSON

I, JAMES T. BENSON, make this declaration and statement under 28 U.S.C. § 1746. I am the plaintiff in this action. I reside at 1709 Arcturus Lane, Virginia Beach, VA 23456, and am employed by the defendant, Contel of Virginia ("Contel"), at its Virginia Beach facility. I have personal knowledge, either directly or acquired from review of documents produced by the defendants in this case, of all the facts and matters set forth in this Declaration.

1. On or about January 18, 1990, Contel posted an opening

for the position of Service Technician, a position under the collective bargaining agreement that Contel had with the Communications Workers of America ("CWA"), a labor organization, also a defendant in this action. I was the successful bidder for the Service Technician Position, and was selected over all other employees who bid for the position, including Barbara Kirker.

[2]2. CWA filed a grievance on behalf of Barbara Kirker over my selection for the Service Technician position. The grievance was denied at each pre-arbitration step by Contel. CWA filed for arbitration, and an arbitration hearing was held on December 2, 1992 ("Kirker Arbitration"), before Norman R. Harlan, arbitrator. Arbitrator Harlan entered an award on March 20, 1993 ("Harlan Award") sustaining the grievance, and awarding the Service Technician position to Barbara Kirker. I have been advised by my attorneys that a true and correct copy of the Harlan Award appears as Attachment S to Plaintiff's Requests for Admission of Facts and the Genuineness of Documents,[1] which has been filed with the

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[1] See CWA's Admissions, at 12, ¶ S.

Court. I have consulted a copy of this document provided to me by my attorneys.

3. I was not aware of the date of the Kirker Arbitration until shortly after the hearing was held, and which time it was too late for me to participate, directly or through counsel or other representative of my own choosing.

4. As a result of the Harlan Award, Contel removed me from the Service Technician position, and returned me to the position of Facility Technician, the position I had held prior to being awarded the Service Technician position. During the pendency of Barbara Kirker's grievance and arbitration, and up until I was informed of Arbitrator Harlan's decision, I was not aware that the successful prosecution by CWA of Barbara Kirker's grievance and arbitration could or would lead to my demotion from a Service Technician to a [3]Facility Technician.

5. Neither CWA nor Contel advised me

- of the date for the Kirker Arbitration in advance of the hearing;

- that I could or should attend the Kirker Arbitration;

- that I could or should ask Arbitrator Harlan to allow me to testify and/or present evidence and/or argument at the Kirker Arbitration;

- that, if I asked Arbitrator Harlan to testify and/or present evidence and/or argument, they (CWA and Contel) would have no objection to my doing so; or

- I could or should hire my own attorney to represent my interests at the Kirker Arbitration.

6. CWA did not advise me that, at the Kirker Arbitration, it would represent Barbara Kirker's interests exclusively, and not neutrally present both my interests and Ms. Kirker's for Arbitrator Harlan to consider.

7. Contel did not advise me that it would represent specifically my personal interests as an employee, as well as its own interests as an employer, in the Kirker Arbitration.

8. If I had participated in the Kirker Arbitration, personally or through a representative of my own choosing, I could have provided detailed testimony concerning my background and experience with my prior employer, RCA, and how it made me more qualified than Barbara Kirker for the Service Technician

position. Such testimony would have been highly relevant to the decision. I know this from [4]reading the Harlan Award, in which Arbitrator Harlan questioned the weight that Contel placed on my prior "supervisory experience" and "experience in construction" and the connection my supervisory and construction experience had to the Qualifications on Contel's Notice Of Job Opening for the Service Technician Position .[2]

9. Arbitrator Harlan stated that

> [t]estimony of Company Witnesses concentrated upon the overall experience of Mr. Benson, particularly his experience monitoring or supervising contractors[;]

that

> * * * Management admittedly gave considerable weight to Jim Benson's supervisory experience and his experience in construction even though neither was listed on the Posting as being either a primary or a secondary requirement[;]

and that

> it is apparent from the testimony of Management Witnesses that the supervisory/general administrative experience gained by Mr. Benson with other Employers was a major factor in his being rated the highest.[3]

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[2] See Harlan Award, p. 19.

[3] Harlan Award, pp. 18, 19, 23.

The award indicates to me that Arbitrator Harlan did not consider Contel's presentation convincing. However, Arbitrator Harlan was not presented with a clear and detailed explanation of how my background and experience with my prior employer (RCA) made me more qualified than Barbara Kirker for the posted Service Technician position. Had I participated in the Kirker Arbitration, I could have supplied this explanation.

10. There are two types of qualifications set out on the Notice of Job Opening, general "Qualifications" and "Additional [5]Qualifications [Which] Will Be Considered A Plus". I could have testified that my RCA "supervisory experience" and "experience in construction" provided me with extensive background and hands-on experience in two of the "Additional Qualifications [Which] Will Be Considered A Plus", specifically: "1. Previous experience splicing, key system, and telephone installation and repair[ ]"; and "2. Understanding construction and engineering drawings."

11. The testimony which I could have given, had I participated in the Kirker Arbitration, would have covered (of course in more detail) the following facts: I began with RCA, while in college in 1966, as a Stockman; I was promoted to Office Manager in 1972,

and became a Branch Manager in 1974. Beginning as a Stockman, I handled material and equipment, and discussed installation and repair problems with RCA's installer/repair personnel, pertaining to working telephone, cable, satellite, and antenna wiring systems. Then, as an Office Manager, I worked with personnel who were responsible for diagraming and wiring those systems. And, as a Branch Manager, I was directly involved in the initial on-site determination of the wiring needs for particular equipment installations, including telephone switching, cable, satellite, security, and antenna systems; furnishing draftsman with information needed to prepare wiring diagrams for these installations; and the on-site installation of the systems, once the diagrams were prepared according to the plans and specifications. Because many of these installations involved assessments of the unique characteristics of office buildings and facilities that are even more complex and difficult than [6]those with which the Contel Service Technician position is involved, my experience with RCA provided me with a high level of qualifications for the posted position.

12. The type of testimony I have outlined in the previous paragraph would have been important to Arbitrator Harlan's

decision. For one example, in the Harlan Award, Arbitrator Harlan states that

> [t]he NOTICE only required an understanding of "construction and engineering drawings. Ms. Kirker stated in her application; "I have a good understanding of construction and engineering drawings." This was not refuted.[4]

My understanding of the Harlan Award, however, is that Barbara Kirker was not entitled to the Service Position simply because what she stated on "her application" "was not refuted". The question of fact was whether she was "as qualified or nearly as qualified as James Benson".[5] Barbara Kirker could have had "a good understanding of construction and engineering drawings", and still not have been "as qualified or nearly as qualified as James Benson" in that area, because my previous experience gave me a significantly better understanding of "construction and engineering drawings" than she had. My testimony could have spoken directly to this matter of relative qualifications. But neither CWA nor Contel called me as a witness, or advised me that I should or could appear

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[4] Harlan Award, p. 19.

[5] See Harlan Award, p. 23.

at the arbitration to provide testimony or argument, or file a post-hearing brief.

[7]13. In addition, the Posted Job Applications of both Barbara Kirker and myself, which were introduced as documentary evidence in the Kirker Arbitration, include the Position Vacancy Worksheets on which we were both separately rated by Contel in upward steps of 1 through 5 on eight factors. One of these factors is "Safety". Barbara Kirker and I were both given a "3" rating by Contel. However, when those equal ratings were given, I had had no prior accidents, and "Ms. Kirker had had a preventable backing accident with a vehicle prior to the interview process starting and the job posting."[6] If I had participated in the Kirker Arbitration, directly or through counsel, I could have shown and argued that with Ms. Kirker's prior accident, and my accident-free record, I should have had a higher rating than Ms. Kirker with respect to "Safety". Furthermore, Qualification 5 on the Notice Of Job Opening states: "Have a valid Virginia operator's license and good driving record." I could also have testified as to the importance good driving and

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[6] Transcript of Kirker Arbitration, p. 57.

safety habits have in the Service Technician's position, which I successfully filled after Contel selected me for it in the Spring of 1990.

14. In the Harlan Award, Arbitrator Harlan touched on the safety issue:

> we note GTE [Contel] mentioned that she [Barbara Kirker] had a vehicle accident * * * in 1989 compared to no accidents * * * for Jim Benson during the same period. * * * We do not consider these latent arguments to render Ms. Kirker unqualified nor do they significantly affect her overall qualifica-[8]tions.[7]

If I had testified or argued at the arbitration hearing, I would not have treated the issue of safety as merely a "latent" argument (as Arbitrator Harlan says Contel did). In addition, the issue of fact before Arbitrator Harlan was not whether the matter of the accident "render[ed] Ms. Kirker unqualified" or "significantly affect[ed] her overall qualifications". The issue was whether, in the area of safety (as well as other areas) she was "as qualified or nearly as qualified as James Benson". If I had participated in the arbitration, I could and would have emphasized that Barbara Kirker did not meet this standard of head-to-head relative qualifications, even if the prior

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[7] Harlan Award, p. 17.

accident did not make her "unqualified" for the posted Service Technician position.

15. If I had participated in the Kirker Arbitration, I also could and would have presented evidence and argument that undercut another erroneous idea that Arbitrator Harlan apparently drew from the limited presentations at the hearing. In the Harlan Award, Arbitrator Harlan states that "the supervisory/general administrative experience gained by Mr. Benson with other Employers was a major factor in his being rated the highest, in spite of the fact these are not mentioned on the job posting".[8] Although the Notice of Job Opening does not list "supervisory" or "administrative" experience as a qualification, it does list: "7. Must have good communciation skills." In fact, the posted Service Technician posi-[9]tion requires that the employee deal closely with outside contractors. If I had participated in the arbitration, I could have testified that my previous experience with RCA prepared me very well for the kind of personal interaction required as a practical matter in the posted Service Technician position. In my former employment I developed

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[8] Harlan Award, p. 23.

the kind of "communication skills" that are useful to a Service Technician in the posted position, inasmuch as that position involves an "inspector's" responsibilities and duties in which "communication skills" are valuable.

16. I have prepared the sheet titled "Pay Cuts", which is attached as Exhibit A to this Declaration. It shows the pay and compensation related losses I sustained, for the period stated, due to Contel's compliance with the Harlan Award. Those losses continue to accrue on the same basis shown on Exhibit A.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on the 7 day of January, 1994.

/s/
JAMES T. BENSON, Declarant

[Exhibit omitted]

APPENDIX G

STIPULATION AND CONSENT ORDER

November 10, 1993

[Clerk's Stamp Omitted in Printing]
IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
(Norfolk Division)

JAMES T. BENSON Plaintiff, v. COMMUNICATIONS WORKERS OF AMERICA, and CONTEL OF VIRGINIA, INC. d/b/a GTE VIRGINIA Defendants.	)	Civil Action No. 2:93CV552

STIPULATION AND CONSENT ORDER

COMES NOW Defendant, Contel of Virginia, Inc., d/b/a/ GTE Virginia ("Contel"), by Counsel, and plaintiff James T. Benson, by Counsel, and pursuant to Rule 7 of the Federal Rules of Civil Procedure stipulate as follows:

1. Defendant Contel hereby acknowledges receipt of service of the Complaint in the above-styled action.

2. Contel agrees to abide by the terms of any injunction or order issued by the court; provided that before any such injunction or order is issued, Contel shall be given reasonable notice of the

nature and scope of the terms of such proposed order or injunction so that it can ascertain whether it is able to perform reasonably the acts required of it.

3. If Contel believes it is unable to perform reasonably such acts and the parties cannot agree to modify the terms of such proposed order or injunction, Contel shall have [2]the right to show cause to the Court as to why it is unable to perform reasonably the acts required of it pursuant to such proposed injunction or order.

4. Contel agrees to comply with all requests and orders pertaining to discovery in the above-styled action.

5. Plaintiff James T. Benson, by Counsel, hereby agrees and acknowledges that defendant Contel shall not be required to appear at any conferences, hearings, trials or other proceedings in this case.

Upon consideration of the Stipulation jointly submitted by counsel for plaintiff and defendant Contel, the Court is of the opinion and finds that leave should be granted to defendant Contel not to appear in this case except as agreed to in this stipulation.

Therefore, it is

[3]ORDERED, that defendant Contel shall not be obligated to appear in this case except as agreed to by the parties in this stipulation.

Enter: 11/30/93

Rebecca Beach Smith /s/
Judge

We ask for this:

BY: Gerald C. Canaan, II /s/
Counsel for defendant
Contel of Virginia, Inc.
d/b/a GTE Virginia

J. Thomas O'Brien. Jr.
Virginia Bar No. 26563
Gerald C. Canaan, II
Virginia Bar No. 33162

[Miscellaneous hand-written entries omitted in printing]

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APPENDIX H

DEPOSITION AND ARBITRATION-HEARING TESTIMONY

DEPOSITION OF JAMES T. BENSON

November 29, 1993

* * *

[88]A. No. sir.

Q. Did anyone in the union suggest to you or ask you -- put it that way -- ask you to appear or to testify at the arbitration hearing?

A. No, they did not.

Q. If you had been called to testify at the arbitration hearing, could you have given information about your qualifications and work experience that would have been more detailed than the documents that Mr. Boyle showed you here today and were made exhibits?

A. I think if I had the chance to speak on my own behalf, I could have, yes, made it clear that I should be the one that was more qualified and considered. Again, without knowing her qualifications, it is a little hard of a question to answer there.

Q. But in terms of fleshing out your qualifications as they were outlined on these documents, could you have provided more

information, more specifics and particulars about your experience, work history, and qualifications?

A. Yes, sir.

Q. If you had been asked to attend, testify at the arbitration, would you have done so?

A. Most definitely.

Q. Did you feel at any time during the course * * *

* * *

DEPOSITION OF NORMAN GLEICHMAN

December 8, 1993

* * *

[25]word. CWA, to your knowledge, does not have a practice of informing employees who may be affected by an arbitration, that they may come, if they choose, to the hearing and participate?

A I am not aware of any such practice.

Q And in the particular instance of the Kirker arbitration, you're not aware that anyone informed Mr. Benson that he might come to the hearing if he so chooses?

A I am not aware of anybody telling him that, no.

Q Why, in the particular case of Ms. Kirker and Mr. Benson, was Mr. Benson not explicitly informed by anyone, to your knowledge, from CWA?

A Well, he wasn't informed by me because it wasn't relevant to the case. Neither were any of the other applicants informed or spoken to by me. Mr. Benson was not the only other applicant for this job.

Q All right. Including any other applicants, you believe that those individuals were not relevant to the prosecution of the arbitration?

A That's right.

Q I take it, then, from the testimony you've [26]already given, that you are not aware that anyone suggested or told Mr. Benson that he might wish to seek representation with respect to the problems that were going to be discussed in the arbitration?

A Was I aware that he had been told to seek representation?

Q Or that he might wish to do that?

A Wish to seek legal representation?

Q Legal representation.

A I am not aware that anybody told him that.

Q Were you aware during that period of time that anyone from the company, Contel, was talking to Mr. Benson about the subject matter of the arbitration?

A Well, I assumed that they were. The company didn't tell me that, but that's not -- that's standard procedure.

(Pause)

Q Now, in the course of your participation in the arbitration, did you consult at any time with Mr. Benson with respect to any of the matters in the arbitration?

A No.

Q Did anyone that you know of consult with [27]Mr. Benson about those matters? By "anyone," I mean consult in the sense of asking him questions about any evidence or witnesses and so forth and so on, as opposed to simply telling him what was going on.

A I do not know the nature of the conversations that he had with these two individuals I testified about earlier. I am not aware of any conversations that Mr. Benson had with any other individuals representing the union.

Q And the two individuals that you're talking about now were the ones that you testified to earlier that you found out about the contacts recently?

A That's right.

Q And why was it that you didn't contact Mr. Benson with respect to the matters in arbitration?

A Again, because nothing that he could have told me, or any of the other applicants, would have been relevant to the issue in arbitration.

Q In terms of the arbitration itself, were you the individual who had authority to decide who CWA would call to testify and what evidence CWA would present?

A Yes.

* * *

[52]THE WITNESS: Well, in terms of his attendance at the hearing, I -- it's just something that has not come up, so I don't know how that would be -- that would have been handled. In terms of his participation, I'm not sure what you mean. Do you mean his addressing the arbitrator, making arguments and so forth?

BY MR. VIEIRA:

Q Yes. Yes. Let's take the scenario that Mr. Benson is allowed into the hearing and then he requests the opportunity to present an argument to the arbitrator because, says he, the effect of the arbitration will be for him to lose his position as the service technician?

MR. BOYLE: I renew my objection. Still calls for speculation.

THE WITNESS: I just don't -- it's never come up, so I'm just not sure how that would have been handled.

BY MR. VIEIRA:

Q Okay. So you've never had an instance then when any employee who was not the actual grievant attempted to come into an arbitration proceeding and make a presentation?

A No. That has never happened.

[53]Q Is there a particular reason for that that you know, or it's just never happened?

A I wouldn't be able to know why that's never happened. It's just never happened.

Q Do you know of anything in the collective bargaining agreement or arbitral practice in District 2 that would preclude the arbitrator from allowing an employee, such as Mr. Benson, to come into the hearing and make some presentation?

A Well, yeah, there are. There are some things that might preclude the arbitrator from allowing Mr. Benson in. And that would be, again, the fact that Mr. Benson is not a party and the

arbitration is to resolve a dispute between two parties, and it would be similar to someone walking off the street into a court room where the person is not a party to the dispute and asking to be heard.

It would be that kind of a thing. So that the contract itself in the arbitration proceeding might well preclude that from happening.

Q Without my suggesting I'm being contentious with you, perhaps Mr. Benson is different from a party off the street and is more akin to an intervener with respect to a [54]court proceeding, because in fact the result of the arbitration was that he ended up being removed from the service technician classification. So that he might have more than an interest than an individual sort of off the street.

Now, under those circumstances, recognizing that he was an individual who had an definite interest in what could come out of that arbitration, do you know of anything in the collective bargaining agreement or practice in District 2 that would have precluded the arbitrator from saying, well, I want to hear this man

because he does have some interest in what's going on in this proceeding?

A Well, there can only be a practice on that issue if it had ever arisen, which it hasn't, so there is no practice one way or the other, other than there is a practice of employees not walking into arbitration proceedings where they're not the grievant.

Q Is there anything in the collective bargaining agreement that you believe would have precluded the arbitrator from allowing Mr. Benson to participate?

A Yes. The fact that the union is a party to the contract and Mr. Benson is not might preclude him from [55]listening to a person who is not a party to the source of his arbitral authority, as it were.

Q But you're not aware of any time that the contract has been so interpreted in a particular case?

A No. Because it's never come up.

Q It's never come up.

MR. VIEIRA: I want to take just a couple minutes.

MR. REILLY: Sure.

(Discussion off the record.)

MR. VIEIRA: Mr. Gleichman, that's the end of our questioning. Thank you for your cooperation.

MR. BOYLE: I just have a couple.

MR. REILLY: Do you want these back?

MR. BOYLE: Yes. I need to look at one first to refresh the witness's recollection.

EXAMINATION

BY MR. BOYLE:

Q Mr. Gleichman, do you recall being handed Exhibits 6 and 7 by Mr. Vieira and not recalling whether you had reviewed those or not?

A Yes.

* * *

TRANSCRIPT OF PROCEEDINGS
BEFORE THE
HONORABLE NORMAN R. HARLAN, ARBITRATOR

December 2, 1992

[Direct Examination of Albert Ryder]

* * *

[57]any disciplinary record, safety, that sort of thing, to compare the two candidates on?

A. One other aspect which was known to us is that Mr. Benson, since he had been with the Company, had not had an accident. Ms. Kirker had had a preventable backing accident with a vehicle prior to the interview process starting and the job posting.

Subsequent to the job posting it was our knowledge that Ms. Kirker had had another --

MR. GLEICHMAN: Subsequent to the what, now?

THE WITNESS: The job posting.

MR. GLEICHMAN: But before your decision.

THE WITNESS: Before the interview.

MR. GLEICHMAN: Okay. I'm sorry.

[A. Ryder - Direct]

A. There had been another accident which I think was preventable. It was stepping over a ditch and fell into a ditch. There was another accident involved.

Q. How did you evaluate or how would you compare the aptitude of these two candidates based on the results of the oral interview?

A. What we were looking for was for [58]somebody who had the fitness, ability, to do this type of work, and Mr. Benson was head and shoulders -- well, probably from the waist up -- above all the other three candidates. Mr. Benson was much more impressive in his conduct during the interview, his presentation of his answers, his background that he had. He could answer the questions -- he answered the questions more completely than any of the other ones. He just had a much better general presentation ability of himself. He presented himself well. He was more convincing that he knew how to handle the problems that could be expected from an inspector.

Q. And based on your observations at the interview and your review of the entire application package and your knowledge of the

two candidates, how would you express your overall opinion in comparing these two candidates?

A. Overall I would say that Mr. Benson was much superior, not only to Ms. Kirker but to the other candidates, also.

In other words, there was no question in my mind who the best candidate was. There was absolutely no question. There was no question who I would pick for number two.

* * *

[Direct Examination of Gene Lowery]

* * *

[91]yourselves in order to achieve a decision?

A. Well, we sat down and looked at each individual ranking and then pertinent to the first two candidates, really, because Mr. Ackaway had chosen Ms. Noble for number one. We sat down and discussed the attributes of the two candidates and decided that Jim Benson was head and shoulders above Rich Noble in the line of construction, and that's what the job entailed as an inspector more so than splicing. Noble had quite a bit of splicing experience but very little real construction experience, so it was determined at that time that Jim Benson was the man for the job.

Q. Now, I'm going to ask you to compare the grievant, Ms. Kirker, to Mr. Benson, who was awarded the job.

How would you compare those two candidates on experience?

A. Well, it was very obvious to me that Jim Benson, with his background in construction, some 22 or 23 years, and the list of a number of things that he had done in construction, as far as managing his own personnel plus managing contractors -- subcon-

[G. Lowery - Direct]

tractors, that is -- and handling all the invoicing and the scheduling of work that he was far **[92]**and above -- far and away above Barbara Kirker, who had been a facility tech and then prior to that had been a Customer Service rep.

Q. Is decision making, the ability to make decisions, a relevant factor for this job?

A. It's a definite factor, yes.

Q. And how would you compare the experience of the two candidates in decision making?

A. Well, I think it would be very obvious who has had the opportunity to work with contractors in a number of different situations and work with people over the years that their ability to make a decision or a proper decision in any given instance would be greater than someone of lesser experience.

Q. How would you compare the two candidates on education?

A. Well, again, Mr. Benson, with his A. A. Degree and the numerous correspondence courses that he had had, plus his courses with Contel at the time, again, he was far away above Barbara Kirker as far as education goes.

[G. Lowery - Direct]

Q. Did you note that Ms. Kirker had a couple of schools that Mr. Benson didn't have, Contel schools?

A. Yes, I was very much aware of that.

[93]Q. How would you evaluate the importance of those particular schools to the job that she applied for?

A. Well, to the best of my knowledge, I know she probably went to school for Customer Service rep and DCRIS training, which neither would, other than the interaction with customers, have had anything to do with construction. Because that's very important. I think the interaction with customers, her being by telephone -- it's a great deal different talking to someone on the phone than it is talking to someone face to face.

Q. How would you compare the two candidates based on their most recent performance evaluation?

A. They were pretty well equal, the best that I remember. I think both were rated a 3 overall. I don't remember anything of Jim Benson's evaluation that said he needed improvement, and Barbara's -- I know that her attendance was not as good as Jim's. Jim had perfect attendance.

[G. Lowery - Direct]

And then the safety aspect, the accidents, Jim was accident-free, and she had had one vehicle accident that we were aware of before the evaluation and then when she slipped and fell. I would have to assume that both were preventable, but [94]I don't know the circumstances surrounding either.

Q. Based on your oral interview of the candidates how would you judge the aptitude of -- how would you compare the aptitude of the two candidates?

A. Well, I thought Barbara was -- Barbara answered every question that was asked of her, but she was uncertain at times and hesitant at times in answering the questions.

Jim I thought was very distinct and very complete in his answers and answered with knowledge of the questions being asked him.

Q. Did you have a discussion with the other -- let me strike that.

In your opinion, taking a look at the two candidates' overall qualifications as reflected in the oral interview as well as the

documentation that was provided to you, how would you compare their abilities to their qualifications to perform this job?

A. Personally, I don't think there was any comparison. I mean, I think they were that far apart.

Q. Which one was better?

A. With Jim Benson being much higher on the scale than Barbara Kirker.

* * *

APPENDIX I

NOTICE OF JOB OPENING

NOTICE OF JOB OPENING

The Company wishes to notify all employees that there is an opening for: SERVICE TECHNICIAN
in the NETWORK DESIGN Area/Division
located at VIRGINIA BEACH

If you feel you meet the qualifications for this position and are interested in being transferred, please forward your "Application for Job Posted" to the Human Resource Representative by JANUARY 29, 1990.

QUALIFICATIONS

1. Experience in climbing.
2. Legible handwriting and not color blind.
3. Be able to work shifts, overtime, weekends, holidays and call-outs.
4. Have good attendance, safety, and health records.
5. Have valid Virginia operator's license and good driving record.
6. Be willing and available to attend and successfully complete any required schools.
7. Must have good communication skills.

ADDITIONAL QUALIFICATIONS WILL BE CONSIDERED A PLUS:

1. Previous experience splicing, key system, and telephone installation and repair.
2. Understand construction and engineering drawings.
3. Be able to locate existing cable facilities and perform D.C. testing.
4. Knowledge of cable throws including throw sheets and cable assignments.
5. Knowledge of "Miss Utility" program, permits and right-of-way.

Applicants meeting all of the above qualifications will be considered before applicants that do not meet all of the qualifications. The company's business needs will determine selection of lesser qualified applicants.

REQ# 1029 01/18/90

Supreme Court, U.S.
FILED
JUL 26 1996
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(2)

No. 95-2003

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

JAMES T. BENSON,
Petitioner,

v.

COMMUNICATIONS WORKERS OF AMERICA and
CONTEL OF VIRGINIA,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeal for the Fourth Circuit

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BRIEF IN OPPOSITION FOR COMMUNICATIONS WORKERS OF AMERICA

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14pp

QUESTIONS PRESENTED

Does the duty of fair representation prohibit a union from forcefully advocating a single interpretation of that takes a grievance arising under a collective bargaining agreement to arbitration agreement that the union has reasonably determined the benefits the represented group as a whole where doing so is detrimental to the short-term interests of a represented individual member of the group?

Does the National Labor Relations Act, construed as prohibiting arbitrary, discriminatory and bad faith conduct by unions toward represented individuals, deprive union represented employees of due process in violation of the Fifth Amendment to the United States Constitution?

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BRIEF IN OPPOSITION FOR COMMUNICATIONS WORKERS OF AMERICA

The decisions below, the basis of this Court's jurisdiction and the constitutional and statutory provisions involved are set out at, pp. 1, 1a-44a & 78a of the *certiorari* petition.

STATEMENT OF THE CASE

This case arises out of a dispute between Contel of Virginia, Inc. and the Communications Workers of America over the proper weight to be accorded seniority in promoting employees covered by the collective bargaining agreement between the Company and the Union and out of a grievance-arbitration precipitated by that contract dispute.

In early 1990, Contel selected James Benson, the plaintiff-petitioner here, to fill a service technician vacancy. Pet. App. 19a. In so doing, Contel bypassed Barbara Kirker, another admittedly qualified applicant for the position, who had substantially more seniority than Mr. Benson.

Id. CWA challenged the Company's decision on the ground that the collective bargaining agreement required the selection of the most senior employee from among the qualified applicants. *Id.*

The agreement's seniority clause provides that "[i]n selecting employees . . . for assignments to higher rated non-management classification, the best qualified senior applicant will be considered to fill the particular vacancy." Pet. App. 19a. A 1990 decision by arbitrator Robert Ables interpreted this language to mean that "the union employee needs only to show he or she is qualified for the position to be entitled to apply seniority as priority for the job." Pet. App. 3a.

Relying on the contract language, as interpreted by the 1990 arbitration decision, CWA argued at arbitration that Ms. Kirker was entitled to the promotion because she was admittedly qualified and she had more seniority than the other qualified applicants. Pet. App. 20a. Contel argued, to the contrary, that the contract entitled it to select the most qualified applicant. *Id.*

Consistent with its position, CWA did not call Ms. Kirker or any other witness to testify to her qualifications, nor did the Union advance any argument concerning the relative qualifications of Ms. Kirker or Mr. Benson. Pet. App. 20a. And, consistent with its position, Contel presented extensive evidence and testimony to the effect that Mr. Benson was substantially more qualified than Ms. Kirker. *Id.* at 20a & 22a. In preparing its case, Contel conferred extensively with Mr. Benson; the Company did not, however, call him as a witness. *Id.* at 14a.

Arbitrator Norman Harlan decided the dispute over the service technician vacancy by finding that Contel had impermissibly selected Mr. Benson on the basis of qualifications that had not been listed in the Company's own job posting. Pet. App. 75a-76a. The arbitrator concluded that Ms. Kirker "met the job qualifications as posted," and thus was entitled to the promotion based on her greater seniority. *Id.* at 76a. Having decided the grievance on this basis, the arbitrator found it unnecessary to

resolve the dispute between Contel and CWA over the precise weight accorded seniority by the agreement. *Id.* at 36a-37a.

When Contel complied with the arbitration decision by awarding the service technician promotion to Ms. Kirker, Mr. Benson filed suit alleging that CWA had breached its duty of fair representation by failing to afford him an opportunity to offer testimony in support of the Contel's promotion decision and that Contel had breached the collective bargaining agreement by complying with an arbitration award rendered infirm by the Union's alleged breach. Alternatively, Mr. Benson alleged that the Union's failure to afford him an opportunity to testify violated his right to due process under the Fifth Amendment to the United States Constitution.

Ruling on cross-motions for summary judgment, the district court (MacKenzie, D.J.) accepted the report of the magistrate judge (Prince, M.J.) recommending that judgment be granted in favor of the defendants. Pet. App. 15a.

Dismissing the fair representation claim, the district court ruled that CWA did not breach its duty by "re-l[ying] upon an earlier interpretation of the meaning of 'best qualified senior applicant' " to "forcefully advocat[e] a single interpretation of the Agreement that the union has reasonably determined benefits the group as a whole." Pet. App. 12a & 13a.

As an alternative ground for dismissing Mr. Benson's statutory claims, the district court concluded that Mr. Benson was not prejudiced by the alleged breach of duty, "because Benson actively assisted Contel in preparing its case for arbitration," and the "[e]vidence that Benson says was missing at the arbitration was presented by Contel." Pet. App. 14a.

Finally, the district court dismissed Mr. Benson's constitutional claims on the grounds that CWA is a private actor, not bound by the due process clause, and that the

implied duty of fair representation is sufficient to sustain the constitutionality of the National Labor Relations Act. Pet. App. 38a-39a.

The court of appeals (Russell & Motz, C.J., and Faber, D.J.) affirmed the district court's rulings on each of the three grounds in an unpublished opinion issued after. Pet. App. 5a-9a.

ARGUMENT

The district court in this case summarily affirmed a magistrate judge's decision rejecting petitioner's claims and granting summary judgment to respondent, and the court of appeals affirmed the district court in an unpublished opinion. As those courts recognized—and as we now briefly demonstrate—petitioner's legal arguments are without substance and without support in the case law and the *certiorari* petition should therefore be denied.

1. Mr. Benson's primary argument is that "[t]he Circuit Court's decision runs roughshod over the basic principle of the DFR as to notice and hearing this Court established in *Steel v. Louisville & Nashville Railroad Co.*, 323 U.S. 192, 204 (1944)." Pet. 7. *See also id.* at 17. *Steele*, says Mr. Benson, requires that a union acting as a bargaining representative give each individual worker notice and an opportunity for hearing "whenever necessary" to furthering that individual's particular interests. *Id.* at 17-18. But the passage from *Steele* on which Mr. Benson relies is the following:

> [T]he statute . . . does require the union, in collective bargaining and in making contracts with the carrier, to *represent* nonunion or minority union members of the craft *without hostile discrimination, fairly, impartially, and in good faith.* Wherever necessary *to that end*, the union is required to consider requests of nonunion members of the craft and expressions of their views with respect to collective bargaining with the employer and to give to them notice of and opportunity for hearing *upon its proposed action.* [323 U.S. at 204 (emphasis added).]

Mr. Benson does *not* maintain that CWA breached its duty by failing to give him a "hearing upon its proposed action" in prosecuting the promotion bypass grievance. *See* Pet. 17. Nor does he maintain that CWA failed to act "fairly, impartially, and in good faith," by advancing an interpretation of the collective bargaining agreement that favored the promotion of the senior qualified applicant. *See* Pet. 14.

Rather, Mr. Benson takes a position that has *no* basis in *Steele*—*viz.*, that by its "dogged pursuit of its 'strict-seniority' theory[,] . . . CWA arbitrarily rejected the possibility that [the arbitrator] would accept Contel's theory," and that because of that possibility "CWA's refusal to provide Benson with notice and opportunity to be heard was arbitrary." Pet. 14-18.[1]

This Court has recently defined what it means for union conduct to be "arbitrary" in the fair representation context: "a union's actions are arbitrary only if, in light of the factual and legal landscape at the time of the union's action, the union behavior is so far outside a 'wide range of reasonableness' as to be irrational." *Air Line Pilots v. O'Neill*, 499 U.S. 65, 67 (1991), quoting *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953). It is plain that the Union's conduct here is not only consistent with

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[1] Mr. Benson asserts that by putting into evidence various documents concerning Ms. Kirker's basic qualifications, "CWA did not merely 'bolster' its 'strict-seniority' case, but argued a *different* factual case based on qualifications." Pet. 16 n.24. As arbitrator Harlan's award makes plain, CWA never argued a "strict seniority" case, which would have entailed a showing that seniority governs without regard to minimal qualifications. Pet. App. 54a. Rather, as the award also makes plain, the Union consistently argued throughout that the agreement contained a "sufficient ability" clause, under which seniority governs among minimally qualified applicants. *Id.* at 51a-52a (describing the Union's argument) & 55a (describing sufficient ability clauses). Under such a clause, it would be necessary to show that Ms. Kirker was minimally qualified in order to establish that she was entitled to the promotion based on seniority.

Steele but also well within its "wide range of reasonableness."

In the instant case, CWA relied on a recent arbitration decision under the same contract in advancing an interpretation that favored seniority. "[T]he union's authority as a collective bargaining representative necessarily empowers it to act according to its own reasonable interpretation of the labor contract." *Bache v. American Telephone & Telegraph Co.*, 840 F.2d 283, 290 (5th Cir.), *cert. denied*, 488 U.S. 888 (1988). That is especially true where the Union relies on an arbitration award upholding seniority, which is recognized as "a valid non-arbitrary means of allocating union benefits. . . ." *Kushto v. Broth. of Railway, Airline & SS Clerks*, 818 F.2d 290, 293 (4th Cir. 1987). *See also Steele*, 323 U.S. at 203; *Huffman*, 345 U.S. at 338-339.

Nor did CWA act irrationally by failing to invite Mr. Benson to participate in the arbitration hearing as a witness supporting the very Company decision being challenged by the Union.[2] The Union has a "legitimate interest in presenting a united front . . . and in not seeing its strength dissipated and its stature denigrated by [individuals] within the unit separately pursuing what they see as separate interests." *Emporium Capwell Co. v. Western Addition Community Org.*, 420 U.S. 50, 70

[2] The courts below found that Mr. Benson was not prejudiced by the Union's alleged breach, because "in defending its decision to select Benson for the job, Contel placed before the arbitrator the relevant facts concerning Benson's prior job experience and qualifications." Pet. App. 8a. *See also id.* at 22a-23a (describing this evidence). Mr. Benson does not deny that Contel presented such evidence, but argues that he could have done a better job than Contel in explaining the "relation of Benson's qualifications to the requirements in the Notice. . . ." Pet. 8. *See also id.* at 8-10. As to the relation of Mr. Benson's work history to the requirements stated by the Contel in the Company's own job-posting notice, the district court was undoubtedly correct that "the arbitrator would be more interested in Contel's assessment . . . than in Benson's assessment. . . ." Pet. App. 14a.

(1975). This interest extends to presenting a united front in arbitration. *See Harris v. Chemical Leaman Tank Lines, Inc.*, 437 F.2d 167, 172 (5th Cir. 1971) ("It would be paradoxical in the extreme if the union, which is authorized to decide whether a grievance is to be pursued to the arbitration stage at all, could not be authorized to assume full responsibility for a grievance it did pursue, without the intervention of the individual union members immediately concerned.").

In sum, as the opinions below amply demonstrate, Mr. Benson's "argument that the duty of fair representation prevents the union from forcefully advocating a single interpretation of the Agreement that the union has reasonably determined benefits the group as a whole," Pet. App. 13a, has no basis in the fair representation case law.

2. Mr. Benson is equally wrong in his claim that "the decision [below] conflicts with decisions of another Court of Appeals and of a State supreme court on the invalidity of an arbitration-award a union obtains without notice to affected employees." Pet. 7 & n.4 citing *Smith v. Hussmann Refrigerator Co.*, 619 F.2d 1229 (8th Cir.), *cert. denied*, 449 U.S. 839 (1980), and *Clark v. Hein-Werner Corp.*, 8 Wis.2d 264, 99 N.W.2d 132 (1959), *cert. denied*, 362 U.S. 962 (1960).

a. In asserting a conflict between the decisions below and *Smith v. Hussmann Refrigerator*, Mr. Benson relies primarily upon the *Smith* plurality opinion, Pet. 18-19. As the magistrate judge correctly notes, "[t]his part of the opinion [for three judges] was not, however, joined by any of the other five judges on the panel." *Pet.* App. 30a. Moreover, the three judge plurality's finding of a breach of duty in *Smith* rested on the determination that the union had failed to make "an informed, reasoned judgment regarding the merits of the claims in terms of the language of the collective bargaining agreement." 619 F.2d at 1237 (footnote omitted). By contrast, CWA's reading of the contract here was not merely

a reasonable one but the very reading of the contract that had been previously endorsed by an arbitrator.

To be sure, the majority in *Smith* did find that a secret "agreement between the company and the union to go back to the arbitrator and arbitrarily rearrange the order of preference among the plaintiffs and the other, more senior employees" was "sufficient . . . to show that the union failed to act in good faith. . . ." 619 F.2d at 1246-47.[3] While Mr. Benson pretends otherwise, Pet. 18-19, this holding does not advance his cause. In this case CWA simply did *not* collude with Contel in any way.

b. A measure of how far Mr. Benson is forced to reach to make up a lower court conflict is his reliance on the 1959 decision of the Wisconsin Supreme Court in *Clark v. Hein-Werner Corp., supra.* Pet. 19. As the magistrate judge convincingly demonstrates, "[t]he *Clark* decision clearly rests on a rationale that has been extinguished by the Supreme Court's subsequent decisions in this area. . . ." Pet. App. 29a citing *Vaca v. Sipes,* 386 U.S. 171, 182 (1967). Therefore, "*Clark* is not good law." *Id.*, quoting *Miller Brewing Co. v. Brewery Workers Local Union No. 9,* 562 F.Supp. 1368, 1373 (E.D. Wis. 1983), *aff'd in part, rev'd in part on other grounds,* 739 F.2d 1159 (7th Cir. 1984) *cert. denied,* 469 U.S. 1160 (1985).[4]

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[3] In his initial decision, the *Smith* arbitrator sustained two of the union's seniority grievances, but allowed the junior employees to maintain the higher job classification, which would be important to them in future promotions. 619 F.2d at 1234. The employer was willing to abide by this award, but the union prevailed upon the employer to jointly request the arbitrator to amend his award so that the junior employees would not maintain the higher classification. *Id.*

[4] Indeed, acknowledging that "*Clark* does state [an] arguably overboard rule," Mr. Benson no longer embraces that opinion for what it says, but instead is reduced to rewriting that opinion by stating what he believes "the *Clark* court implicitly recognized" and conjecturing as to what "the *Clark* court clearly would have

3. Finally, Mr. Benson challenges the lower courts' ruling "den[ying] there is state action in the status of an exclusive representative under NLRA § 9(a) . . ." Pet. 7.

Mr. Benson argues that *Steele* "decided that state action exists under the analogous [exclusive representation] provision of the Railway Labor Act." Pet. 7. This misreading of *Steele* is not new. In *Steelworkers v. Sadlowski*, 457 U.S. 102 (1982), the respondents advanced an identical state action argument:

> Congress has endowed labor unions with extraordinary authority. It has made unions the exclusive representative of the employees for whom they bargain whether the employee desires such representation or not. * * * Such authority is governmental in nature; indeed, this Court stated in *Steele v. Louisville & N.R.*, 323 U.S. 192 (1944), that the bargaining ". . . representative is clothed with power not unlike that of a legislature which is subject to constitutional limitations . . . ." 323 U.S. at 198; . . . . [Brief for *Sadlowski* Respondents 48.]

This Court dismissed this argument as unsound stating that the union's conduct "does not involve state action." *Sadlowski*, 457 U.S. at 121 n.16, citing *Steelworkers v. Weber*, 443 U.S. 193, 200 (1979) (holding that the exercise of the power to act as an exclusive representative under the NLRA "does not involve state action"). Consistent with this Court's state action rulings, the circuit courts have repeatedly declined to apply constitutional due process requirements to private grievance-arbitration procedures. *See Bures v. Houston Symphony Society*, 503 F.2d 842, 843 (5th Cir. 1974); *Ramsey v. NLRB*, 327 F.2d 784, 788 (7th Cir.), *cert. denied*, 377 U.S. 1003 (1964).

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countenanced. . . ." Pet. 19 n.36. Mr. Benson's effort to give *Clark* a saving reinterpretation relies entirely on *Thompson v. Int'l Ass'n of Machinists*, 258 F. Supp. 235 (E.D. Va. 1966), Pet. 19. As the Fourth Circuit decision in this case recognizes, *Thompson* is of no aid to Mr. Benson in this regard. Pet. App. 7a.

This is not to say that individual employees have no recourse against unfair treatment by their exclusive representative. "[T]he duty of fair representation has stood as a bulwark to prevent arbitrary union conduct against individuals stripped of traditional forms of redress by the provisions of federal labor laws." *Vaca v. Sipes, supra,* 386 U.S. at 182. "It is well-settled . . . that the union's duty of fair representation, prohibiting it from acting arbitrarily, discriminatorily, or in bad faith toward any member, adequately protects the individual's interests." Pet. App. 15a. For this reason, the courts below correctly rejected "Benson's argument . . . that he is constitutionally entitled to represent himself, independently from his bargaining unit and contrary to the collective bargaining scheme established by Congress in enacting the federal labor laws." *Id.*

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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(3)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

JAMES T. BENSON,

Petitioner,

v.

COMMUNICATIONS WORKERS OF AMERICA and CONTEL OF VIRGINIA,

Respondents.

On petition for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit

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PETITIONER'S REPLY BRIEF

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August 1996

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PETITIONER'S REPLY BRIEF

INTRODUCTION

Pursuant to this Court's Rule 15.6, petitioner James T. Benson files this reply to the Brief in Opposition for Communications Workers of America ("CWA Br").

ARGUMENT

A. CWA's opposition avoids the basic issue of the Janus-like behavior that caused its breach of the duty of fair representation ("DFR").

1. CWA claims it never "advance[d] any argument concerning the relative qualifications of Ms. Kirker or Mr. Benson", but instead "consistently argued throughout [the arbitration] that the [collective-bargaining] agreement contained a 'sufficient ability' clause, under which seniority governs among minimally qualified applicants".[1] This would come as a surprise to arbitrator Harlan, who noted that "[b]oth Management and the Union went into considerable detail in their Briefs discussing qualifications", and who ruled that "Barbara Kirker * * * [i]s as qualified or nearly as qualified as James Benson".[2] It would also come as a surprise to the Magistrate Judge, who (on the very page CWA cites in support of the contrary proposition) observed that "CWA took the position that 'best qualified senior applicant' required Contel to select Kirker, because Benson had 'less seniority *and less Contel schooling*'".[3] These statements clearly point to a "relative-qualifications" argument by the union which the arbitrator wrongly found persuasive.

Contrary to CWA's suggestion, Benson has never contended that CWA originally argued a "seniority" theory that ignored *all* considerations of qualifications. What Benson calls CWA's "strict-seniority" theory assumed that an employee had at least *minimal* qualifications for the job. But no one ever doubted that Kirker and Benson both had at least minimal qualifications. As CWA originally treated the grievance, the practical issue was whether the promotion should be given on the basis of seniority only, precisely because Benson and Kirker were both at least minimally qualified and CWA assumed that only minimal qualifications were necessary. This is why CWA's attorney testified that "nothing [Benson] could have

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[1] CWA Br at 2, 5 n.1.

[2] Petition at 67a, 75a.

[3] *Id.* at 20a (emphasis supplied), *cited in* CWA Br at 2.

told me * * * would have been relevant to the issue in arbitration".[4] When relative qualifications emerged as the issue at the arbitration-hearing, CWA was faced with—and argued successfully, to Benson's detriment—a theory *new* to it, as to which Benson could most definitely have told the union many things that "would have been relevant", had CWA bothered to give him a hearing.

2. CWA *wrongly* states that "Benson does *not* maintain that CWA breached its duty [of fair representation] by failing to give him a 'hearing upon its proposed action' in prosecuting the promotion bypass grievance. *See* Pet. 17."[5] The *only* way in which CWA would not have breached its DFR by failing to give Benson notice and hearing would have been if the union had never argued, and the arbitrator had not decided the case on the basis of, relative qualifications. Once relative qualifications became an issue, CWA had a patent conflict of interest between Benson and Kirker, which it could resolve only by giving Benson *some* hearing, instead of none at all.[6]

3. CWA defends its conduct by saying that "'a union's actions are arbitrary only if, in light of the factual and legal landscape at the time of the union's action, the union behavior is so far outside a "wide range of reasonableness" as to be irrational'".[7] At the time of the union's action that was the proximate cause of Benson's loss of his promotion—when CWA argued relative qualifications before arbitrator Harlan—CWA knew or should have known it had an irresolvable conflict of interest that required some action to protect *Benson's* interests, to whom the union owed the DFR. But CWA never took even the first rational step in that direction: interviewing Benson to determine if his qualifications were in fact superior to Kirker's. Rather, from the very onset of and throughout the grievance, CWA's attorney took the head-in-the-sand position that

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[4] Petition at 113a-14a.

[5] CWA Br at 5.

[6] *See* Petition at 14-17.

[7] CWA Br at 5.

"nothing [Benson] could have told me * * * would have been relevant to the issue in arbitration".[8] If simply refusing to ascertain the very facts that proved controlling in the arbitration, from the employee whose interests were most crucially affected by the presentation of those facts, is not *un*reasonable "representation", nothing is.

4. CWA also defends its conduct by saying that it "relied on a recent arbitration decision under the same contract in advancing an interpretation that favored seniority".[9] This is only half true. Initially, CWA relied on the "Ables Award", under which the seniority of *minimally* qualified applicants would have controlled the award of the promotion—and under which Benson's participation in the grievance-arbitration process might arguably have been unnecessary. In the arbitration, however, arbitrator Harlan ruled the Ables Award *in*applicable, and that *relative* qualifications had to be considered. At that point, CWA could not—and, prevailing in the arbitration, self-evidently did not—rely any further on the Ables Award to justify freezing Benson out of the process and taking away his promotion. So, CWA's initial reliance on the Ables Award, even if arguably reasonable at that time, cannot constitute a defense for its later misconduct.

5. CWA contends that its desire to present "a united front" exonerates it from "failing to invite Mr. Benson to participate in the arbitration hearing".[10] This argument would be understandable had CWA argued *only* its "strict-seniority" theory—for then the union would have had no conflict of interest between Benson and Kirker, and could arguably have seen Benson simply as "a witness supporting the very Company decision being challenged by the Union".[11] When relative qualifications emerged as the issue, however, Benson could and should have been seen—and would have been seen, had CWA bothered to investigate the matter—as a

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[8] Petition at 113a-14a.

[9] CWA Br at 6.

[10] CWA Br at 6 (footnote omitted).

[11] *Id.*

witness supporting the position *the union* should have taken consonant with its DFR towards him. At that point, Benson's was not a "'separate interest[ ]'" (as CWA wrongly contends[12]), but the interest the union should have championed. At the very minimum, CWA either itself should have investigated the issue of relative qualifications or allowed Benson personally to present his own evidence at the arbitration hearing.

Vapid is CWA's notion that Contel adequately made Benson's case, because "'the arbitrator would be more interested in Contel's assessment...than in Benson's assessment'".[13] The factual focus of the case before arbitrator Harlan was the relation of Benson's prior work-experience *outside of Contel* to the qualifications on the Notice of Job Opening. All Contel could and did present on this subject was hearsay filtered through a Contel witness who had *no* personal knowledge of, let alone work-experience as to, Benson's prior employment. As the man who had *actually worked* both on the previous jobs outside of Contel and in the Contel Service-Technician job after his initial promotion, Benson was *uniquely* qualified to describe to the arbitrator the practical, on-the-job relationship between his prior experience and his then-present position. Depriving Benson of an opportunity to testify at the hearing denied the arbitrator the *only* source of complete information on the subject.

In sum, CWA begs the question when it argues that the DFR does not "prevent[it] from forcefully advocating a single interpretation of the [collective-bargaining] Agreement".[14] For, here, CWA did *not* advocate "a *single* interpretation", but *two*—the first ("strict-seniority"), uniquely favorable to Kirker, whom the union represented "forcefully"; the second (relative-qualifications), arguably favorable to Benson, whom the union represented not at all.

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[12] *Id.*

[13] *Id* at 6 n.2.

[14] *Id.* at 7.

B. CWA is wrong to deny that a serious conflict exists among the courts as to the Circuit Court's construction of the DFR in this case.

1. *Pace* CWA, Benson does not rely "primarily upon the *Smith* plurality opinion", but upon a careful parsing of *all* the non-dissenting opinions in *Smith* v. *Hussmann Refrigerator Co.*, 619 F.2d 1229 (8th Cir. 1980).[15] CWA's further point that, unlike the union in *Smith*, it did make "'an informed, reasoned judgment regarding the claims in terms of the language of the collective bargaining agreement'" based on the Ables Award,[16] is simply wrong. Even if CWA's reliance on the Ables Award was "informed" and "reasoned" *before* the arbitration-hearing took place, *at the hearing* CWA "went into considerable detail in [its] Brief[ ] discussing qualifications"—and, indeed, won the arbitration on the arbitrator's finding that "Barbara Kirker * * * [i]s as qualified or nearly as qualified as James Benson".[17] At the point that relative qualifications became the key issue—and an issue on which Benson could and should have prevailed—CWA's decision to continue not to represent Benson at all was anything but reasonable, but was an out-and-out abnegation of its DFR.

2. *Pace* CWA, Benson's reading of *Clark* v. *Hein-Werner Corp.*, 8 Wis. 2d 264, 99 N.W.2d 132 (1959), is not a matter of his personal "rewriting" that "relies entirely on *Thompson v. Int'l Ass'n of Machinists*, 258 F. Supp. 235 (E.D. Va. 1966)", but instead finds support in other decisions of the Wisconsin Supreme Court so interpreting *Clark*.[18]

C. Finally, CWA's denial that NLRA § 9(a) embodies "state action" is dead wrong.[19]

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[15] *Contrast* CWA Br at 7 *with* Petition at 18-19.

[16] CWA Br at 7-8.

[17] Petition at 67a, 75a.

[18] *Contrast* CWA Br. at 8-9 & n.4 *with* Petition at 19 n.36.

[19] *See* CWA Br at 9-10.

1. That the complainant union members in *Steelworkers* v. *Sadlowski*, 457 U.S. 102 (1982), unsuccessfully attempted to invoke the governmental-action doctrine of *Steele* v. *Louisville & Nashville Railroad Co.*, 323 U.S. 192 (1944), is beside the point.[20] In *Sadlowski*, the complainants challenged an *internal* union election-rule, not union action alleged to violate the DFR. This Court rejected the claim that the First Amendment applied to the rule, on the ground that "the union's decision to adopt [the] rule does not involve state action".[21] But the union in *Sadlowski* did not adopt its election-rule under color of NLRA § 9(a); whereas, here, CWA deprived Benson of property without procedural due process, precisely under color of that statute.

The case *Sadlowski* cited, *Steelworkers* v. *Weber*, 443 U.S. 193 (1979), helps CWA not at all, either. In *Weber*, the complainant emphasized that "[t]his case arises under Title VII. *No claim for relief based on the constitution is presented.*"[22] This Court did note, by way of *dicta*, that, "[s]ince the Kaiser-UAW plan does not involve state action, this case does not present an alleged violation of the Equal Protection Clause of the Fourteenth Amendment".[23] But the observation that unions and employers acting under the *federal* NLRA have not received the imprimatur of *State* power that would subject them to the *Fourteenth* Amendment says nothing about whether they have received the imprimatur of *Congressional* power that subjects them to the *First* and *Fifth* Amendments. *Steele*, after all, held that in exclusive representation "*Congress* has seen fit to clothe the bargaining representative with powers comparable to those possessed by a legislative body".[24]

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[20] *Pace* CWA Br at 9.

[21] 457 U.S. at 121 n.16.

[22] Brief of Brian F. Weber at 46 (footnotes omitted)(emphasis supplied).

[23] 443 U.S. at 200.

[24] 323 U.S. at 202 (emphasis supplied).

2. CWA's only other new case, *Ramsey* v. *NLRA*, 327 F.2d 784 (7th Cir. 1964),[25] provides no better support for the union's errant position. For *Ramsey* merely asserts—with no analysis of or even citation to any of this Court's decisions—that "[t]here is no statutory or constitutional right of an employee to be present at an arbitration hearing".[26] That statement, however, is plainly wrong, in that the DFR—which courts read into NLRA § 9(a)—*does* provide employees with such a "statutory" right in some cases.[27] Whether there is also an effective *constitutional* right depends upon this Court's enforcement of *Steele's* mandate that, to be constitutional, exclusive representation must impose upon a union the duty "to consider requests of nonunion members of the craft and expressions of their views with respect to collective bargaining * * * *and to give them notice of and opportunity for hearing upon its proposed action*".[28] If Benson's "statutory" right (the DFR) does not protect him against *ersatz* "representation" by CWA that licenses the union simultaneously to promote the interests of another, antagonistic employee and to prevent Benson from protecting his own interests, then the constitutional issue reserved in *Steele* arises in all its starkness—and this Court must apply the right *Steele* recognized for Benson to receive "notice of and opportunity for hearing upon [CWA's] proposed action".

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[25] CWA Br at 9 also cites *Bures* v. *Houston Symphony Society*, 503 F.2d 842 (5th Cir. 1974). Benson has already distinguished *Bures* in Petition at 21.

[26] 327 F.2d at 787.

[27] *See* Petition at 18-19.

[28] 323 U.S. at 204 (emphasis supplied).

CONCLUSION

For the foregoing reasons and the reasons set out in Benson's original petition, this Court should issue a writ of certiorari.

Respectfully submitted,

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